(13)

No. 88-1872-CFX
Status: GRANTED

Title: Cynthia Rutan, et al., Petitioners
v.
Republican Party of Illinois, et al.

Docketed:
May 17, 1989

Court: United States Court of Appeals
for the Seventh Circuit

Vide:
88-2074

Counsel for petitioner: Leahy,Mary Lee

Counsel for respondent: Oxtoby,Robert T., Sullivan,Thomas P., Taylor,G. Michael

Entry	Date	Note	Proceedings and Orders
1	May 17 1989	G	Petition for writ of certiorari filed.
3	Jun 16 1989		Brief of respondents Mark Frech, et al. in opposition filed.
5	Jun 16 1989	G	Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae in No. 88-1872 filed.
4	Jun 21 1989		DISTRIBUTED. September 25, 1989
6	Jun 24 1989		Waiver of right of respondent Irvin Smith to respond filed.
7	Jul 14 1989	X	Reply brief of petitioners Cynthia Rutan, et al. filed.
8	Jul 26 1989		REDISTRIBUTED. September 25, 1989
9	Oct 2 1989		Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae in No. 88-1872 GRANTED.
10	Oct 2 1989		Petition GRANTED. The case is consolidated with 88-2074, and a total of one hour is allotted for oral argument. **********
11	Oct 16 1989		Record filed.
		*	Certified copy of C. A. Proceedings received. (Vide: 88-2074).
12	Oct 24 1989		Record filed.
		*	Certified copy of original record received.
13	Nov 2 1989	G	Motion of petitioners/cross-respondents to dispense with printing the joint appendix filed.
14	Nov 13 1989		Motion of petitioners/cross-respondents to dispense with printing the joint appendix GRANTED.
16	Nov 13 1989		Order extending time to file brief of petitioner on the merits until November 20, 1989.
18	Nov 16 1989	G	Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae filed.
19	Nov 17 1989		Brief of petitioners Cynthia Rutan, et al. filed. VIDED.
20	Nov 17 1989		Brief amicus curiae of National Education Association filed. VIDED.
21	Nov 20 1989		Brief amicus curiae of AFL-CIO filed. VIDED.
22	Nov 27 1989		SET FOR ARGUMENT TUESDAY, JANUARY 16, 1990. (3RD CASE)
23	Dec 4 1989		Motion of Independent Voters of Illinois-Independent Precinct Organization, et al. for leave to file a brief as amici curiae GRANTED.
25	Dec 6 1989	G	Motion of North Carolina Professional Fire Fighters Association for leave to file a brief as amicus curiae filed.
24	Dec 8 1989		CIRCULATED.

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No. 88-1872-CFX

Entry	Date	Note	Proceedings and Orders
26	Dec 18 1989	X	Brief of respondents State Officials filed. VIDED.
27	Dec 18 1989	X	Brief amicus curiae of Commonwealth of Puerto Rico filed. VIDED.
28	Dec 30 1989		Adoption of brief on the merits of respondents/cross-petitioners by the Republican State Central Committee ofIllinois and its Chairman, Albert Jourdan received and distributed. VIDED
30	Jan 5 1990		Adoption of brief on the merits of respondents/cross-petitioners by Irvin Smith, representative of all Republican County Chairmen in Illinois received and distributed. VIDED
29	Jan 8 1990		Motion of North Carolina Professional Fire Fighters Association for leave to file a brief as amicus curiae GRANTED.
31	Jan 8 1990	X	Reply brief of petitioners Cynthia Rutan, et al. filed. VIDED.
32	Jan 16 1990		ARGUED.

88-1872

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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12 7pp

QUESTIONS PRESENTED

1. Is it constitutional to deny a public employee a promotion due to his or her political beliefs or his or her political affiliation?

2. Is it constitutional to deny a public employee a transfer due to his or her political beliefs or his or her political affiliation?

3. Is it constitutional to deny a qualified applicant an opportunity for public employment due to his political beliefs or his political affiliation?

4. Is it constitutional to condition promotion or transfer of public employees upon political support of, or financial contribution to, a favored political party or candidate?

5. Is it constitutional to condition obtaining public employment itself upon political support of, or financial contribution to a favored political party or candidate?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioners:

CYNTHIA RUTAN, FRANKLIN TAYLOR, and JAMES MOORE, individually and as representatives of state employees and potential state employees denied benefits and persons denied employment.[1, 2]

Respondents:

THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members;

JAMES THOMPSON, individually and as Governor of the State of Illinois;

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities;

[1] The District Court failed to consider whether the petitioners may properly present this case as a class action. The Seventh Circuit Court of Appeals held this did not deprive that Court of jurisdiction and proceeded to consider the claims presented by petitioners. (A.7).

[2] Plaintiffs Standefer and O'Brien in this case claimed they were not recalled to State employment after lay-off due to their political affiliation. The Seventh Circuit reversed the dismissal of their claims holding the claims were political discharge cases falling under *Elrod v. Burns*, 427 U.S. 347 (1976). Therefore, Plaintiffs Standefer and O'Brien are not seeking review of the Seventh Circuit's ruling as to them.

GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; and

LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois Departments, Boards and Commissions under the jurisdiction of the Governor.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CYNTHIA RUTAN, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, CYNTHIA RUTAN, FRANKLIN TAYLOR, and JIM MOORE, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 16, 1989.

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988). The opinion issued en banc has not yet been published. Both are reprinted in the appendix hereto, p. A-1 and p. B-1, infra.

The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641

F.Supp. 249 (C.D. Ill. 1986) and is reprinted in the appendix hereto, p. C-1, infra.

JURISDICTION

This cause arose under 42 *United States Code* 1983, 1985. The United States District Court for the Central District of Illinois had jurisdiction under 28 *United States Code* 1331, 1343. On July 11, 1986, the District Court granted respondents' motion to dismiss.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On June 8, 1988, the Court of Appeals entered a judgment and opinion holding the denial of Petitioners Rutan and Taylor's promotions and transfer due to their political affiliation was not unconstitutional unless the denials constituted constructive discharge. Judge Ripple dissented as to the holding of the Court that only denial of promotion and transfer constituting constructive discharge was unconstitutional.

The court further held the denial of an opportunity for employment due to Petitioner Moore's political affiliation was constitutional. The Seventh Circuit reached this conclusion in a roundabout manner essentially holding that federal courts are not open to address Petitioner Moore's claim or others' claims that they were denied a job due to their political beliefs or affiliation. The court admitted First Amendment rights were implicated in denial of a job but did not directly address the constitutional issues involved. If Petitioner Moore's constitutional rights have been violated the federal courts are not available to provide him redress. Thus, the Court de facto extended constitutional protection to every system of political hiring. Judge Ripple dissented from the Court's affirmation of the dismissal of Petitioner Moore's claim.

On August 17, 1988, the Court of Appeals granted petitioners suggestion for rehearing en banc.

On February 16, 1989, the Court of Appeals sitting en banc (Judges Wood and Flaum not participating) entered a judgment and opinion substantially the same as the initial opinion. Judge Ripple again dissented, joined by Judge Cudahy, as to the holding regarding petitioners Rutan and Taylor's claims. Judge Ripple further dissented from the affirmation of the dismissal of petitioner Moore's claim.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 *United States Code* 1985:

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
>
> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the

> United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfuly, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property

on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF CASE

This case was decided on a motion to dismiss. Under a motion to dismiss under Federal Rule of Civil Procedure 12(b) (6), all well-pleaded allegations of the complaint are deemed admitted with every reasonable doubt resolved in favor of the pleader. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969).

Petitioner Cynthia Rutan has worked for the Department of Rehabilitation Services of the State of Illinois since 1974. She has repeatedly applied for available promotions within the Bureau of Adjudicative Services where she works. She was qualified for those positions but has not been promoted. Those positions have been filled with persons less qualified than the Petitioner. Petitioner Rutan has not supported the Republican Party or its candidates financially or otherwise, but those put in the positions for which she had applied had supported that party.

Petitioner Franklin Taylor has worked for the Illinois Department of Transportation as an equipment operator since 1969. In July of 1983 Petitioner Taylor applied for a vacant lead worker position which would have been a promotion for him. Medford Phillips was promoted to that

vacancy. He was less qualified and had less seniority than did Petitioner Taylor but Phillips had the support and approval of the Fulton County Republican Party for that promotion. That approval was necessary to obtain the promotion. Petitioner Taylor could not obtain that approval due to his political affiliation.

Respondents denied Petitioners Rutan and Taylor the promotions they sought due to their political beliefs and party affiliation.

Petitioner Franklin Taylor also sought a geographical transfer from Fulton County to Schuyler County, the county in which he resides. This would have placed his work site closer to home. Respondents denied that transfer because the Republican County Chairmen in the two counties involved would not approve the transfer due to Petitioner Taylor's political beliefs and affiliation.

Petitioner James Moore was honorably discharged from the United States Army in 1958 and, thus, qualifies for veteran status in seeking employment with the State of Illinois. Since 1978 he has repeatedly sought employment with the State, particularly for available positions within the Department of Corrections. He was denied those jobs because he could not obtain the signatures of the Pope County Republican chairman and the Republican state representative. Petitioner Moore could not obtain the necessary signatures due to his political affiliation. Jobs for which he had applied, and for which he was qualified, were filled with persons less qualified, but those persons were affiliated with the favored political party. He was denied employment due to his political beliefs and affiliation.

The system which denied Petitioners promotions, transfer and employment itself is sophisticated. In late 1980, the approval for filling any position or for creating any new employment position was assigned to the Governor's Office

of Personnel. That Office controls all hiring, transfers, and promotions in all departments, boards and commissions under the jurisdiction of the Governor and is funded by tax dollars with a budget of at least $250,000.00. Five thousand positions are filled by that office each year either by promotion, transfer or hire.

The Republican Party screens employees and prospective employees to determine their past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future "volunteer" work on behalf of the Republican Party and its candidates, and the voting history of the person and the voting history of relatives of such persons.

The Sangamon County Republican Central Committee form (Exhibit B attached to the Complaint) used to screen state employees for promotion, reads as follows:

SANGAMON COUNTY
REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET,
SPRINGFIELD, IL 62701

PRINT OR TYPE

NAME _____ DATE _____

ADDRESS _____

PRECINCT _____ TOWNSHIP _____

TELEPHONE _____

VOTING ADDRESS IF DIFFERENT _____

PRECINCT _____

AGE _____ DATE OF BIRTH _____

SOCIAL SECURITY # _____

PRESENT POSITION _____ DEP'T _____

DESIRED POSITION _____ DEP'T _____

HOW LONG IN PRESENT POSITION _____

REASON FOR CHANGE___ ARE YOU QUALIFIED? ___

GIVE NAME OF TEST TAKEN _____

GRADE _____ DATE _____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?

1984 _____ 1982_____ 1980_____ 1978_____

NOTE: if under age, question applies to parents.

Enter Name here:_____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Precinct Committeeman

I RECOMMEND THE ABOVE APPLICANT BECAUSE___

_____

_____
Signature of Precinct Committeeman

The recommendations of the Republican Party are then forwarded to the Governor's Office of Personnel. That Office also independently checks the person's voting record and the voting records of the person's relatives. It then decides who will fill what position.

The filling of positions, be it promotion, transfer or hire, is based upon political factors, namely, the contribution of

money to the Republican party and the support of that party and its candidates. Those who are politically favored are promoted, transferred or hired. Those who are not so favored are not promoted, transferred or hired.

Petitioners filed suit under 42 *United States Code* 1983, 1985, as state employees and potential state employees, individually and on behalf of others similarly situated, charging that by denying them promotion, transfer and employment due to their political affiliation, the respondents had violated their First Amendment rights to freedom of speech and freedom of association as applied to the states by the Fourteenth Amendment to the United States Constitution.[3]

The Seventh Circuit, sitting en banc, held employment actions toward public employees based upon political belief or affiliation cannot give rise to constitutional claims unless those actions constitute constructive discharge. In so ruling the Seventh Circuit did not follow the rule of the majority of Circuits. Judges Ripple and Cudahy dissented following the holding of those circuits particularly the opinion of the Third Circuit in *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987).[4]

While admitting that the denial of employment did implicate petitioner Moore's First Amendment rights, the Seventh Circuit did not address the constitutionality of his claim under traditional First Amendment jurisprudence. The Seventh Circuit held the federal courts were not open to deal with his claim, thus, giving defacto constitutional

[3] The petitioners also claimed that this system of promotion, transfer and hiring violated their constitutional rights as voters. The petitioners are not pursuing those claims before this Court.

[4] While the Seventh Circuit remanded for determination of whether the denials of promotion and transfer constituted constructive discharge, the matter is final as to those members of the class petitioners Rutan and Taylor sought to represent whose denials of promotion and transfer do not constitute constructive discharge. The denial of their promotions and transfer, short of constructive discharge, due to their political beliefs and party affiliation is constitutional.

protection to all systems of hiring based upon political beliefs and affiliation.

REASONS FOR GRANTING THE WRIT

Introduction

It is difficult to set forth the reasons for granting the writ in this case any better than Judge Ripple did in his dissent to the en banc opinion:

> In this bob-tailed en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F.2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. Id. at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh, and Atlanta can expect protection when a local politician makes life uncomfortable because they do not knuckle under to his political will — even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual."

The need for Supreme Court review of this important question is evident. American citizens serving their country in state and local government ought not have their legal protection depend on the accident of where Congress decided to draw the administrative line separating one circuit from another. Review on certiorari is particularly ap-

propriate in this case because the majority's reasoning depends, to a great extent, on its disagreement with the governing precedent of the Supreme Court. See Supreme Court Rule 17.1(c) (certiorari appropriate "(w)hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court"). It may be that the majority has perceived correctly the winds of change. But change must come from the Supreme Court, not a regional court of appeals. For us, stare decisis must be the governing principle. (A 33-34)

I. The Decision Of The Seventh Circuit In This Case Is In Direct Conflict With The Decisions Of Other Circuit Courts Of Appeal

A. The Courts of Appeal Recognize That Denial of Promotion and Transfer Due To Political Beliefs and Political Affiliation Violates First Amendment Rights But The Courts of Appeal are Sharply Divided As to Whether That Denial Is Unconstitutional.

In its decision in this case the Seventh Circuit followed the Fourth Circuit in holding the denial of promotion and transfer must be "the substantial equivalent of dismissal," in order to state a cause of action. *Delong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980) [5].

The Seventh Circuit's holding on promotion and transfer conflicts sharply with the majority of the Courts of Appeal. The majority of Circuits has held the public employer cannot condition a term of employment on political beliefs or political affiliation. In *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987)

the plaintiffs charged their demotions were a direct result of their political affiliation and their support of an unsuccessful mayoral candidate. The Court held the First Amendment protection extended to employment action short of discharge and said:

> Although *Pickering*, *Elrod* and *Branti* each involved dismissals from employment, the rationale of each dealt with the constitutionality of action adversely affecting an interest in employment in retaliation for an exercise of first amendment rights. As we read those cases, the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech. "The first amendment is implicated whenever a government employee is disciplined for his speech." *Waters v. Chaffin*, 684 F.2d 833, 837 n. 9 (11th Cir. 1982) (demotion and transfer).
> 823 F.2d at 731 (emphasis added).

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[5] The Seventh Circuit had never before limited First Amendment protection of public employees to acts amounting to constructive discharge. Rather the Seventh Circuit had applied traditional First Amendment jurisprudence and had an outstanding record in protecting public employees' First Amendment rights: *Mueller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (written reprimand); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (transfer); *Knapp v. Whitaker, et al.*, 757 F.2d 827 (7th Cir. 1985) (transfer); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (transfer); *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) (denial of promotion; summary judgment of the facts for defendants affirmed but underlying premise was that the complaint stated a cause of action); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (harassment after public employee had run for public office and made statements on public issues and had supported another candidate after she lost the primary). Either the Seventh Circuit has reversed its holdings in these cases, sub silentio, or it has carved out denial of First Amendment protection when the association is political party affiliation.

In *Bennis* the Third Circuit followed its prior holding in *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984), where the Court had held that the public employee's allegations that he was transferred and also denied a promotion due to union activity and statements made to the press stated a cause of action. See also *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983) (suspension).

In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the Eleventh Circuit held that the First Amendment is always implicated when adverse action is taken against a public employee for having exercised free speech. The Court proceeded to apply the traditional balancing test, *Pickering v. Board of Education*, 391 U.S. 563 (1968), and then reversed the judgment entered in favor of the police department which had demoted the police officer.

In *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988), the plaintiff, a Republican, was an assistant to a Democratic office holder. Her salary, vacation pay and other benefits of employment were set by the town board most of whom were Democrats. After the plaintiff ran unsuccessfully for public office, the board denied her compensatory and vacation time. She sued charging that the action was due to her political affiliation.

The District Court dismissed the complaint and following *Delong*, held that political claims were limited to discharge. The Second Circuit reversed, rejecting *Delong* and adopting the *Bennis* holding. The Court said:

> While, as noted, a public employee's First Amendment rights are not absolutely protected, to affirm the dismissal of plaintiff's second cause of action might condone politically motivated harassment or other unconstitutional treatment of public employees in those cases where the public

> employer's action stops short of discharge.
> 857 F.2d at 900. (Emphasis added)

These Circuits have soundly rejected *Delong*. As Judge Ripple in this case said in the dissent:

> Although the *Delong* test attempts to apply the *Elrod* criteria to cases not involving discharge, its approach is an illusory one. It places an unrealistic burden of proof on the plaintiff and creates an impossible judicial task.
>
> To succeed, the plaintiff must establish that, although a reasonable person would resign under such pressure to his first amendment rights, he has decided to "hang on." It is not surprising that the *Delong* test would produce such an unrealistic burden of proof; it is premised on a fundamental misapprehension of the analysis required by established first amendment jurisprudence.
> 848 F.2d at 1412, B 32-33.

Petitioners submit the Seventh Circuit's holding that only employment actions constituting constructive discharge are actionable will lead to more litigation.

The implications of the Seventh Circuit's holding for individual public employees are clear. As Judge Ripple said:

> The majority's holding today will subject countless dedicated governmental workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved, *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clinical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may now be passed over for

> promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in identical fashion. 848 F.2d at 1413, B 34.

The chilling effect of the Seventh Circuit decision on First Amendment rights cannot be overstated.

Today public employees in New York, Philadelphia, and Atlanta have greater First Amendment protection than public employees working in Milwaukee or Chicago.

This Court cannot allow such disparate treatment to continue. First Amendment rights must be accorded uniform protection.

B. The Courts of Appeal Are Also Divided As To Whether The Denial Of Public Employment Itself Due To Political Beliefs Or Affiliation Is Constitutional.

The Seventh Circuit in the instant case is the only Circuit to have held de facto that the denial of employment due to political beliefs or affiliation can never be unconstitutional. The other Circuit to have addressed political hiring narrowly limited its holding, after full factual development of the case, to the informal hiring system before it. *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).

The Sixth Circuit's decision in *Avery* was in direct contradiction to that Circuit's decision in *Marohinic v. Walker*, 800 F.2d 613 (6th Cir. 1986), where Court held that a First Amendment claim is stated where a former employee can demonstrate that his protected conduct motivated a former public employer to give potential employers negative references.

The decision of the Seventh Circuit in this case and the decision of the Sixth Circuit in *Avery* are in direct opposition to the decisions of other Circuit Courts of Appeal.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff applied for forty positions at the Library of Congress. He claimed that he was denied those positions due to his affiliation with the Young Socialist Alliance. The District Court dismissed this claim. The D.C. Circuit reversed, holding:

> The district court's judgment on this claim must be reversed and the claim must be remanded for consideration of whether Clark met his burden of proof under the standard applicable to first amendment-based employment discrimination claims.
> 750 F.2d at 101.

The Court then held the standard found in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), controlled:

> Under the Mt. Healthy standard, a plaintiff must prove that conduct protected by the first amendment was a "substantial" or "motivating" factor in the employer's decision not to act favorably on the plaintiff's application.
> 750 F.2d at 101. (Emphasis added)

Once the plaintiff has met that burden the burden shifts to the employer to demonstrate that it would have rejected the application even in the absence of the protected conduct.

In *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), cert. denied, 434 U.S. 892 (1977) the Third Circuit found discharge and hiring comparable:

> In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association.
> 555 F.2d at 392.

In *Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546 (E.D.N.Y.), appeal dismissed, 566 F.2d 846 (2nd Cir. 1977), a case remarkably like the present case, the Court held that conditioning the hiring and promotion of persons for county jobs on political campaign contributions to local politicians was plainly unconstitutional. The Court recognized there was no right to public employment but held:

> . . . denial of employment or promotion may not be conditioned on the making of a financial contribution to a political party.
> 435 F.Supp. at 552.

In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), the Court held that inquiry into the private, off-duty personal life of an applicant for employment as a police officer violated her rights to privacy as guaranteed by the First Amendment. The Court said:

> A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. 726 F.2d at 469.

Such a drastic divergence of opinion requires this Court to intervene. Whether or not a person can be denied a job due to political beliefs or affiliation cannot depend on geography.

The Seventh Circuit's holding that no system of denial of employment due to political affiliation can ever be unconstitutional has overwhelming implications. This holding will effectively bar thousands of persons from pursuing their chosen occupation for certain professions and positions fall

exclusively within the province of public employment: law enforcement, corrections, regulation of certain industries, etc. Several other professions or positions are in large measure, if not overwhelmingly, within the province of public employment: education, child welfare, public aid, mental health, etc. To allow the state to bar persons from public employment because of their political beliefs and associations is to effectively bar these people from pursuing their chosen professions and employment. This Court simply cannot allow this situation to continue in Illinois, Wisconsin and Indiana while applicants for public employment in other Circuits do not face such a bar.

II. The Seventh Circuit's Decision In This Case Relegates First Amendment Rights To A Position Vastly Inferior To Fourteenth Amendment Rights.

Petitioners submit that the Seventh Circuit's holding in this case relegates First Amendment rights to a position vastly inferior to Fourteenth Amendment rights. In cases brought under 42 *United States Code* 1983, the Courts of Appeal have never applied the constructive discharge standard to a person denied a benefit of public employment due to race or sex. *Riordan v. Kempiners, et al.*, 831 F.2d 690 (7th Cir. 1987) (salary difference of state employees-sex); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (harassment and retaliation of a fire department employee-race).

The Courts of Appeal have repeatedly recognized a cause of action brought under 42 *United States Code* 1983 for failure to hire due to race or sex. In *Van Houdnos v. Evans, et al.*, 807 F.2d 648 (7th Cir. 1986), the Seventh Circuit reversed a directed verdict for defendant and reinstated a jury verdict for the plaintiff who was denied a position at the Illinois State Museum due to her sex. In *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir. 1988), the Court reversed the District Court's summary judg-

ment for the defendant as to certain individual applicants' claims that they were denied employment due to their race. In *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), the Court reversed the dismissal of the claims of certain applicants for public employment and the dismissal of claims of public employees denied promotion due to race.

There is no rational basis to relegate the right to freedom of speech and freedom of association to an inferior position vis-a-vis the right to be free from discrimination based upon race or sex. Decades before blacks were considered persons and over a hundred years before women were granted the right to vote, this nation established the right to freedom of speech and freedom of association. Those rights form the foundation of representative democracy. Those rights must not be relegated to a position inferior to Fourteenth Amendment rights in the promotion, transfer or hire of qualified persons for public employees.

III. The Seventh Circuit's Decision In This Case Is Inconsistent With Principles Previously Established By This Court.

In this case, the Seventh Circuit ignored the analysis required by long established First Amendment jurisprudence. Under that analysis, the initial question is whether the conduct in which plaintiffs engaged is protected by the First Amendment to the United States Constitution. Petitioners have the First Amendment right to support a particular political party, a particular candidate, or a particular political belief. Petitioners also have the right, also protected by the First Amendment, to refrain from supporting a particular party or candidate or political belief. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jaycees*, 468 U.S. 610 (1984) and *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), aff'd 475 U.S. 292 (1986).

Once it is established that petitioners conduct is protected by the First Amendment, the burden shifts to the respondents to establish that the restrictions imposed on political beliefs or affiliation are justified by overriding interests of the state or important governmental needs. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972).

This Court confronted exercise of those fundamental First Amendment rights in *Elrod v. Burns*, 427 U.S. 347 (1976), and said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves

> to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individuals ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished. 427 U.S. at 355-356.

Petitioners submit the impact for those denied promotion, transfer, or a job itself is no less.

This Court has paid particular attention to the rights of applicants denied a State benefit due to their exercise of First Amendment rights. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

This Court demonstrated there is no rational explanation for drawing a distinction between an "applicant's" First Amendment rights and an "employee's" First Amendment rights in *Perry v. Sinderman*, 408 U.S. 593 (1972). Assuming that teacher Sinderman had no employment rights did not decide the case. This Court held:

> "Thus, the respondent's lack of a contractual or tenure 'right' to reemployment. . .is immaterial to his free speech claims. 408 U.S. at 597.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court reaffirmed its holding in *Elrod*. In *Branti* the incoming administration sought to fire assistant public defenders in order to hire those who were politically favored. In that sense *Branti* was a hiring case. As to hiring, this Court said:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:
>
> "Perhaps not squarely presented in this action,

> but deeply disturbing nonetheless, is the question of the propriety of political considerations emerging into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 445 U.S. at 520. (n. 14).

Most recently this Court addressed the First Amendment rights of an applicant in *Frazee v. Illinois Department of Employment Security*, _____ U.S. _____, 109 S.Ct. 1514 (1989). This Court reversed the Illinois court which had affirmed the denial of unemployment compensation to a man who refused to accept a job that forced him to work on Sundays. He claimed work on Sunday violated his religious beliefs. Applying the traditional First Amendment analysis, this Court said:

> The State offers no justification for the burden that the denial of benefits places on Frazee's right to exercise his religion. 109 S.Ct. at 1518.

A person may have no unconditional right to public employment, but he cannot be barred from employment for reasons that offend the Constitution.[6]

In its decision in this case the Seventh Circuit recognized that the petitioners Rutan, Taylor and Moore had engaged in conduct protected by the First Amendment. But the Seventh Circuit did not move on to the second step in the

traditional First Amendment analysis. The Seventh Circuit never identified the state interest that is so overriding as to justify tax dollars paid by Independents, Democrats and Republicans (of a different political philosophy from the incumbent administration) being spent as a reward to those who have supported the respondents. The Seventh Circuit never identified any overriding state interest that is served by having the Respondents' supporters and contributors receive promotions, transfers, or employment. The Seventh Circuit never identified what overriding state interest is served by denying promotion to those more qualified nor what interest is served by denying a job itself to those more qualified. The Seventh Circuit did not identify what state interest is served by denying promotions, transfers and jobs based on political beliefs and affiliation. If anything the First Amendment would indicate state interests in a representative democracy are served by the protection of freedom of speech and association. That amendment encourages persons to speak or associate, to remain silent, or to not associate as that person decides.

The Seventh Circuit also ignored the third step in traditional First Amendment analysis. If there is a State interest that justifies restricting First Amendment rights, that restriction must be stated in clearly understandable terms. How much money must be contributed to demonstrate the support necessary for a promotion? How much precinct work must be done to obtain the geographical transfer?

[6] Numerous law review articles conclude that political hiring is unconstitutional. *See, e.g.,* Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 Colum. L. Rev. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181, 200 (1982); Note, 29 Emory L. J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*,

The failure to use the traditional First Amendment analysis led the Seventh Circuit to its erroneous conclusions and led the Seventh Circuit to rule contrary to precedent clearly established by this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2073
CYNTHIA RUTAN, et al.,

Plaintiffs-Appellants,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 85 C 2369 — **Harold A. Baker**, *Chief Judge*.

ARGUED APRIL 7, 1987 — REARGUED
SEPTEMBER 27, 1988
DECIDED FEBRUARY 16, 1989

Before BAUER, *Chief Judge*, CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION and KANNE, *Circuit Judges*.*

MANION, *Circuit Judge*. Plaintiffs appeal the district court's dismissal of their complaint challenging a public employer's use of political considerations in hiring, rehiring,

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* Judge Wood, Jr. and Judge Flaum did not participate in the argument or decision in this case.

transferring and promoting employees. *See Rutan v. Republican Party of Illinois*, 641 F.Supp. 249 (C.D. Ill. 1986). We affirm in part, reverse in part, and remand.

I.
NATURE OF THE CASE

In their complaint, plaintiffs alleged that Governor James R. Thompson of Illinois, the Republican Party of Illinois, and various state and Republican Party officials use political considerations in hiring, rehiring from layoffs, transferring and promoting state employees under Governor Thompson's jurisdiction. Because we are reviewing the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted, we take the allegations in the complaint as true. *See LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377, 379 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 2892 (1986).

According to the detailed complaint, approximately 60,000 state employees work in more than fifty "departments, boards and commissions under the jurisdiction" of Governor Thompson. On November 12, 1980, Governor Thompson issued an executive order "which requires his personal approval or that of a designee before any individual may be hired or promoted." The executive order, which is attached to the complaint, states:

> HIRING FREEZE
>
> Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All*

> *hiring is frozen.* There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

(emphasis in original). Governor Thompson has assigned power over significant employment decisions to the "Governor's Office of Personnel." Plaintiffs contend that the Office of Personnel's employment decisions are

> . . . substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of defendant Thompson, or is sponsored by those who are friends or supporters of defendant Thompson, or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of defendant Thompson.

This patronage employment system, plaintiffs claim, creates a significant political advantage "in favor of the 'ins,' i.e., Defendant James Thompson and his political allies, and against the 'outs,' i.e., those who may wish to challenge him in elections."

The defendants are Governor Thompson, the Illinois Republican Party, seven current or former state officials and two Republican Party officials. Plaintiffs sued two of the state officials as class representatives, one as a representative of all "directors, heads or chief executive officers . . . since 1981" of state agencies under the Governor's jurisdiction and the other as a representative of all persons who acted as "liaisons" between those state agencies and the Governor's Office of Personnel. Plaintiffs sued the Republican Party officials as representatives of the class of "all Republican State Central Committee and County Central Committee officials and members . . . since February 1, 1981."

Plaintiffs brought this action both as individuals and as representatives of six different classes. These classes are: (1) voters; (2) taxpayers; (3) politically unacceptable employees denied promotions; (4) politically unacceptable employees denied transfers; (5) politically unacceptable employees who have not been rehired after being laid off; and (6) politically unacceptable employment applicants who have applied for but not received a job.

Plaintiff Cynthia Rutan has worked for the Department of Rehabilitative Services since 1974. She has neither been active in the Republican Party nor supported Republican candidates. Since 1981, Rutan has applied for promotion into supervisory positions in the Department of Rehabilitative Services. Defendants allegedly filled each of these supervisory positions with someone less qualified but "favored on a political basis by the Governor's Office of Personnel." Rutan sued on her own behalf and as a class representative of those denied promotions as a result of the patronage system.

Plaintiff Franklin Taylor works for the Department of Transportation. He does not support the Republican Party. In 1983, Taylor applied for a promotion. A less qualified person, whom the Fulton County Republican Party supported, received the promotion. Taylor subsequently requested a transfer to a different county. Taylor was allegedly advised that he was not transferred because the Republican Party chairmen of Fulton and Schuyler Counties opposed the transfer. He sued on his own behalf and a class representative of those denied promotions and transfers as a result of the patronage system.

Plaintiff Ricky Standefer was hired in a temporary position at the State Garage in Springfield in May, 1984. In November of that year he and five other employees were laid off. The five other employees, who had Republican Party support, were offered other state jobs. Standefer, who had

voted in the Democratic primary, was not. He sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff Dan O'Brien was employed as a "Dietary Manager I" at the Department of Mental Health and Developmental Disabilities' Lincoln Development Center. O'Brien has voted only once in a primary, and that was in a Democratic Party primary. O'Brien was laid off on April 5, 1983. Under the "Rules of the Department of Central Management Services," a laid-off employee can be recalled within two years. If recalled, the employee's benefits continue and he does not lose seniority. In December of 1984, an administrator at the Lincoln Development Center told O'Brien that he would be recalled. The administrator stated, however, that he was waiting to receive the necessary exception to Governor Thompson's hiring freeze. In February of 1985, O'Brien was told that the Governor's Office had denied him an exception to the freeze. "Several months" after being laid off, O'Brien attempted to and "ultimately" did receive employment with the Department of Corrections. He obtained this job after obtaining the support of the Chairman of the Logan County Republican Party. This job paid less money than his previous job. O'Brien sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff James Moore "has sought employment with the State of Illinois particularly with the Department of Corrections" since 1978. In 1980, Moore received a letter from a Republican state representative informing him that he would have to "receive the endorsement of the Republican Party in Polk County before I can refer your name to the Governor's office." Moore alleges that while he was attempting to obtain a position with the state, the son of the chairman

of the Polk County Republican Central Committee, the "son-in-law of the Vice-chairman and precinct committeewoman of the Polk County Republican Central Committee," and a Republican precinct committeeman were hired by the State in positions for which Moore was qualified. Moore sued on his own behalf and on behalf of all those denied employment as a result of the patronage system.

Plaintiffs also brought claims as voters and taxpayers. They claimed to represent a class of voters "who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters." They also claimed to represent a class of taxpayers who "are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent on the operation and maintenance of a State political patronage system." As voters, plaintiffs claimed that the patronage system has diminished the value of their votes, thus denying them "a voice in government of equal effectiveness with other voters." As taxpayers, plaintiffs claimed to have been deprived of tax "monies . . . which have been expended for the support of the patronage system and not for a governmental purpose."

Plaintiffs sought relief under numerous federal and state law theories. *See Rutan*, 641 F. Supp. at 252-59. On appeal we are concerned with two: (1) their claims as employees or potential employees that the patronage system violated their rights under the First Amendment as applied to the states through the Fourteenth Amendment; and (2) their claims as voters that the patronage employment system violated the Fourteenth Amendment by denying them equal access and

effectiveness in elections.[1] As relief, plaintiffs sought over a billion dollars in damages and transfer of the Governor's control over the state employment system to a federal receiver.

Defendants moved to dismiss the complaint under Fed. R.Civ.P. 12(b)(6) on the ground that it failed to state a claim for relief. The district court granted defendants' motion. *See Rutan*, 641 F.Supp. 249 (C.D.Ill. 1986). This appeal ensued.

II.
ANALYSIS

A. *The District Court's Failure to Consider the Class Action Question.*

Before addressing the substantive issues raised on this appeal, we must first address the district court's failure to consider whether plaintiffs may properly bring this case as a class action. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted but did not first consider whether the action may be properly brought as a class action. This vio-

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[1] In the portion of their briefs denominated "Statement of Questions" plaintiffs purported to raise an equal protection claim based on their capacities as employees and employment applicants. Plaintiffs' employment claims, however, rise and fall on their First Amendment claims because their arguments in the brief are argued solely under the First Amendment. Whatever its merits, plaintiffs' failure to argue their equal protection claim waived that claim. *See Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987).

Plaintiffs also appeal the district court's decision to dismiss, for lack of pendent jurisdiction, their state law claim brought as taxpayers. Because we remand four plaintiffs' employment claims, the district court should consider on remand whether it should exercise pendent jurisdiction over that claim. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Any consideration of that claim should also, as with all claims brought in federal court, analyze whether plaintiffs have standing to bring those claims.

lates Fed.R.Civ.P. 23(c)(1), which requires the district court to address the issue of class certification "as soon as practicable." *See Hickey v. Duffy*, 827 F.2d 234, 237 (7th Cir. 1987); *Bennett v. Tucker*, 827 F.2d 63, 66-67 (7th Cir. 1987). The district court's failure to address the class action issue does not deprive us of jurisdiction under 28 U.S.C. § 1291. The district court's order dismissed the suit in its entirety, leaving nothing to be decided in that court. *See Hickey*, 827 F.2d at 238; *see also Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987). Thus, even though the district court should have addressed the class action issue, its failure to do so does not destroy the finality of its decision.

The failure to address the class action issue, however, does limit the scope of our judgment. Because no class of plaintiffs or defendants were certified, only the named plaintiffs and named defendants are before this court. *See Hickey*, 827 F.2d at 238 (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). Therefore, we treat plaintiffs' claims as being brought solely by the named plaintiffs against the named defendants. *See Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975); *see also Pharo v. Smith*, 621 F.2d 656, 663-64 (5th Cir. 1980), *modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980) (per curiam).

B. *Patronage Employment Claims*

Plaintiffs' employment claims challenge the validity of a longstanding feature of American politics. Each plaintiff claims that he or she did not receive some favorable employment decisions because political considerations substantially motivated the defendant's employment decisions. Plaintiffs argue that the defendants placed an unconstitutional burden on their freedom of belief and association guaranteed by the First Amendment by relying upon political considerations in making employment decisions. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . .

. . presupposes a freedom not to associate."). On the other hand, defendants argue that the district court properly dismissed plaintiffs' claims because the First Amendment does not require absolute political neutrality by a public employer in making employment decisions. According to defendants, public employer patronage practices violate the First Amendment only if an employee whose party affiliation is not a necessary requirement for his job is discharged or threatened with discharge. Thus, we must resolve two issues in addressing these claims: (1) whether, and to what extent, a public employer may take political affiliation into account in making employment decisions; and (2) whether, under the appropriate substantive rule, the district court properly dismissed plaintiffs' claims.

For years, hiring and retaining public employes rested exclusively within the legislature's and executive's discretion. A public employee's challenge to a particular employment practice that affected his free expression was met with Justice Holmes' famous pronouncement as a member of the Supreme Judicial Court of Massachusetts that, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, (1892); *see generally Connick v. Myers*, 461 U.S. 138, 143-44 (1983). The latter half of this century has seen employees' rights broadly expand and legislative and executive discretion correspondingly diminish. *See Connick*, 461 U.S. at 143-47. The Supreme Court has struck down state laws that required public employees to take an oath denying past or present affiliation with the Communist Party, or other "subversive" organizations, *Wiemmann v. Updegraff*, 344 U.S. 183 (1952), as well as laws that barred members of the Communist Party and other "subversive" organizations from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967). Other cases have firmly established that a public employee may not be discharged for speaking out

on matters of public concern. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, retribution short of discharge that is directed at an employee's speech has also been held to violate the First Amendment. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

Although broad, public employees' First Amendment rights are not absolute. The First Amendment requires us to balance the employee's interest in free expression against the State's legitimate interests served by the challenged practice. *See Pickering v. Board of Education*, 391 U.S. at 568; *cf. Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, discharging an employee whose complaints about the workplace disrupt the workplace and undermine a supervisor's authority does not violate the First Amendment. *See Connick*, 461 U.S. at 150-54 (1983). Similarly, public employer work rules that are legitimately related to the workplace's effective functioning and "not aimed at particular parties, groups or points of view" do not violate the First Amendment even though the rules may negatively affect employees' speech or political association. *See Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (upholding Hatch Amendment restrictions on political activities by federal employees); *cf. Bart*, 677 F.2d at 624-25 (upholding rule requiring employee-candidate to take leave of absence while campaigning).

There are few areas where the balancing of interests under the First Amendment analysis is more sharply debated, or more uncertain, than the area of political patronage in employment. The Supreme Court first addressed the validity of patronage employment practices in *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, a Democrat succeeded a Republican in the Cook County, Illinois Sheriff's Office. The new sheriff discharged some of the incumbent employees and threatened to discharge others because they were not affiliated with or sponsored by the Democratic Party. A

divided Supreme Court held that this practice violated the First Amendment.

Drawing heavily upon *Keyishian* and *Pickering*, a three-justice plurality stated that the patronage dismissals unnecessarily restricted political belief and association and that "any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment of the First Amendment freedoms." 427 U.S. at 372-73 (plurality). Although generally unimpressed with patronage practices, the plurality did limit its consideration of the issues to patronage dismissals and not to other patronage practices. *Id.* at 353 (plurality). Moreover, Justice Stewart's concurrence (in which Justice Blackmun joined) expressly limited the Court's holding to cases where, solely on the basis of political belief, a nonpolicymaking, nonconfidential employee is discharged or threatened with discharge from a job that he is satisfactorily performing. 427 U.S. at 375 (Stewart, J. concurring).

The Court next addressed patronage employment in *Branti v. Finkel*, 445 U.S. 507 (1980), and slightly modified its holding in *Elrod*. In *Branti*, two Republican assistant public defenders sued after a newly-elected Democratic public defender threatened them with discharge. The Court ruled for the assistants, holding that a public employer cannot discharge an employee based on party affiliation unless "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Again the Court expressly limited its consideration of the issues to patronage dismissals. *Id.* at 513 n.7.

In light of the limited nature of the Supreme Court's holdings in *Branti* and *Elrod*, the courts of appeals generally have hesitated to extend the rule those cases enunciated. In *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this circuit affirmed the dismissal of a complaint filed by a contractor who alleged that a mayor

violated the contractor's First Amendment rights by rejecting the contractor's bid for a city contract because the contractor did not support the mayor politically. In reaching its conclusion, the *LaFalce* court balanced the interference with political expression caused by the patronage practice against "the consequences of trying to prevent . . . [the interference] through an interpretation of the Constitution." *Id.* at 293-94.

The court first found that a contractor's loss of a particular bid was less disruptive than an employee's loss of a job; a contractor still has other potential contracts to bid on. Moreover, the interference was not likely to affect many businesses, given that most stay on good terms with all major political parties. *Id.* at 294.

The court then determined that the costs of attempting to interfere with the patronage practices outweighed any interference with political affiliations.

> [A]gainst the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws, . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaigns, and decisions such as *Elrod* and *Branti*, have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it further raises profound questions of political science that exceed judicial competence to answer. . . .

Id. The court also expressed concern that public officials would be subject to suit by disappointed bidders each time the city awarded a bid. Finally, the court expressed reluc-

tance to "take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*." *Id.* at 294-95; *see also Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors, not employees, held not to violate First Amendment); *Sweeney v. Bond*, 669 F.2d 542, 545-46 (8th Cir.) (partisan dismissals of "fee agents" who were independent contractors held not to violate First Amendment), *cert. denied*, 459 U.S. 878 (1982).

In the employment context, the courts of appeals have extended *Branti* and *Elrod* beyond outright discharges and threats of discharges. For example, the courts have held that partisan decisions not to allow an employee to retain his job after the employee's "official" term of employment expires may violate the First Amendment. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Furlong v. Gudknecht*, 808 F.2d 233 (3d Cir. 1986); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984). An open question remains, however, over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment.

In *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980), the Fourth Circuit limited employees' challenges to patronage practices to those practices that "can be determined to be the substantial equivalent of dismissal." *id.* at 624. In that case, the plaintiff, a Republican, challenged his transfer and reassignment from his position as State Director of the Farmers Home Administration in Maine to a position as a project assistant in Washington, D.C. The plaintiff had been transferred and reassigned as part of a policy of the Secretary of Agriculture to replace Republican state directors with Democrats.

The district court granted the government summary judgment on the ground that plaintiff's position as a state director was a "policymaking" position. On appeal, the Fourth Circuit

reversed and remanded the case to be considered under *Branti*'s newly articulated test: whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *DeLong*, 621 F.2d at 622 n.2 (quoting *Branti*, 445 U.S. at 519). In so holding, the court rejected the government's argument that the patronage assignment and transfer of an employee protected under *Branti* and *Elrod* could never constitute an unconstitutional burden upon an employee's beliefs and associations. The court did, however, limit such challenges to those patronage practices which, while not actual or threatened discharges, could be considered tantamount to a dismissal. *Id.* at 623-24. In pertinent part the court reasoned:

> Dismissal or the threat of dismissal for political patronage reasons is of course the ultimate means of achieving by indirection the impermissible result of a direct command to a government employee to cease exercising protected rights of free political association and speech. This is *Elrod*'s and *Branti*'s specific, narrow application of the principle. We believe that when the principle is applied to patronage practices other than dismissal it is rightly confined to those that can be determined to be the substantial equivalent of dismissal.
>
> In applying the principle, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount to outright dismissal. This much and no more, we conclude, is a necessary implication from the broader principle drawn upon in *Elrod*.... It is obvious that not every reassignment or transfer can fairly be thought to have this quality. It is equally obvious that in practical terms some might.

Id.

The "substantial equivalent to a dismissal" standard focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave his job. *See, e.g., Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984); *see also Patterson v. Portch*, 853 F.2d 1399, 1405-07 (7th Cir. 1988). In the course of most, if not all, people's employment a wide variety of disappointments, and possibly some injustices, occur. Most of these are normal incidents of employment that would not lead a reasonble person to quit. *See Bristow v. The Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985) (denial of promotion in and of itself cannot constitute a constructive discharge); *Schaulis v. CTB/McGraw-Hill*, 496 F.Supp. 666 (N.D. Cal. 1980) ("An employer has not effected a constructive discharge merely because an employee believes that she has . . . limited opportunities for advancement."). However, whether a particular action can be viewed as "substantially equivalent to a dismissal" (or a constructive discharge) is not subject to hard and fast rules. The court must take all the case's circumstances into account.[2] Being placed in a sinecure may be some employee's idea of the ultimate job. For other employees, enforced idleness may be a humiliating experience as well as one that may permanently impair an employee's professional skills. *See Parrett*, 737 F.2d 690. Moreover, there may be special circumstances that sharply

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[2] Many constructive discharge cases in the employment discrimination area have required that the employer specifically intend for an employee to resign. *See Bristow*, 770 F.2d 1251, 1255 (4th Cir. 1985) (Title VII). This appears to be an open question in this circuit. See *Henn v. National Geograph Society*, 819 F.2d 824, 829 (7th Cir. 1987). *DeLong* does not place any such requirements in patronage cases, nor do we think it would be appropriate to do so. *Branti*, *Elrod*, and *DeLong* all focus on the burden a patronage system places on an employee, not on the employer's intent to impose the burden.

increase the severity of impact of what might otherwise be viewed as a routine employment decision. Under the *DeLong* analysis a court may take all these circumstances into account. *DeLong*, 621 F.2d at 624. The ultimate issue remains, however, whether a particular patronage decision "imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal." *Id.*

In contrast to the Fourth Circuit's analysis in *DeLong*, the Third Circuit has recently held that the rule enunciated in *Branti* and *Elrod* extends to any "disciplinary action" by a public employer. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), a group of police officers brought suit against several defendants. The officers alleged that the defendants demoted them for engaging in political activity, or alternatively, that the defendants demoted them to make room for the new mayor's political supporters. On appeal, the defendants argued that plaintiffs' claims that they were demoted to make room for political supporters failed as a matter of law. The defendants contended that the rule enunciated in *Branti* and *Elrod* was strictly limited to patronage discharges and did not extend to practices that placed lesser burdens on plaintiffs' associational interests. The Third Circuit rejected both this argument and the "substantial equivalent to dismissal" standard set forth in *DeLong*. *Id.* at 731 n.9. According to the Third Circuit, the rule enunciated in *Elrod* and *Branti* was not limited by the harshness of a particular action but rather extended to the imposition of any "disciplinary action" imposed for the exercise of First Amendment rights.

DeLong and *Bennis* enunciate significantly different standards for analyzing patronage claims. *DeLong* limits the rule enunciated in *Branti* and *Elrod* to constructive discharges. On the other hand, *Bennis* apparently extends the rule to a wide range of employment decisions, including decisions

concerning routine transfers and promotions. We believe the *DeLong* analysis is more sound.[3]

DeLong properly extends *Branti*'s and *Elrod*'s protections beyond those decisions' narrow holdings to protect employees from patronage practices that may, as a practical matter, impose the same burden as outright termination. As we explain below, however, the *DeLong* analysis also properly takes into account the limited nature of the Court's holdings in *Branti* and *Elrod* and the fact that real differences exist between dismissals and other patronage practices. It also takes into account the substantial intrusion of the federal

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[3] In adopting the *DeLong* analysis, we recognize that language in *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) indicates that a public employer may never take political factors into account. In *Hermes* two police officers alleged that they were denied promotions because eligibility tests and examination scores were "rigged" to favor other candidates who had local political support. The district court granted summary judgment on the ground that there was no evidence that political affiliations entered into the decision. On appeal, this court stated that "the district court's grant of summary judgment will be sustained if the only reasonable inferences from the record are that [the allegedly politically-favored candidates] would have been promoted regardless of their political affiliations." 742 F.2d at 353. The court then affirmed the grant of summary judgment.

Defendants here distinguish *Hermes* on the ground that *Hermes* involved "rigged" test scores and eligibility lists. We do not find that distinction persuasive. Whatever the effect such conduct may have on other rights, we do not believe the First Amendment issue turns on whether political factors are taken into account in an underhanded manner. Nonetheless, the language in *Hermes* does not control this case. The holding of a previous panel of this circuit is binding on other panels. Dictum is not. *See generally United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988). And the language in *Hermes* must be considered dictum. Because of its summary disposition of the case the panel did not, nor did it need to, test the merits *of an extension of Branti* and *Elrod*. The panel merely cited *Branti* and *Elrod* in a footnote for the undisputed proposition that the right not to associate is protected under the First Amendment. There is no discussion of the reluctance expressed in *LaFalce* to extend *Branti's* and *Elrod*'s holdings or of the Fourth Circuit's

(Footnote continued on next page)

courts into the political affairs of the States and other branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges.

By favoring political supporters or those who are connected with political supporters, a patronage system will unquestionably have some negative effects on those people who did not support or are not connected with the party or faction in power. The partisan denial of a promotion, transfer, or employment application leaves someone in a possibly lesser position than he would have been absent patronage considerations. At the same time, however, the burden imposed by such patronage decisions is much less significant than losing a job.

While we recognize that in a certain economic sense the failure to win a job may harm a person as much as the failure to keep one, we follow the plurality's approach in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). There the plurality stated that an affirmative action plan's dis-

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[3] *continued*

decision in *DeLong*. There is also no indication that, on appeal, the defendants challenged any unprecedented expansion of *Elrod*. If the patronage issue was necessary to its holding, the court would have gone into these issues in great detail. Moreover, we note that *Hermes* has not been cited in any patronage case decided by other circuits. Accordingly, because the language contained in *Hermes* is dictum, it does not control this case.Futhermore, contrary to plaintiffs' suggestion, *Danenberger v. Johnson*, 821 F.2d 361 (7th Cir. 1987) does not support the proposition that patronage promotion decisions violate the Constitution. In *Danenberger* the court upheld the dismissal of plaintiff's complaint on the grounds of qualified immunity because no clearly established right to a promotion decision free of any political considerations existed at the time of the challenged promotion decision. *Id.* That the claim was dismissed on qualified immunity grounds in no way implies that such a constitutional right exists, *see Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); it means only that either there is no right, or if there is a right, it is not clearly established in the time at issue.

criminatory effects may be justified when it involves losing future employment opportunity but not when it involves losing a present position. The plurality reasoned that losing an employment opportunity is not as intrusive as losing an existing job. *Wygant*, 476 U.S. at 279-84 (plurality); *see also Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) ("That [affirmative action] plan does not require the discharge of white workers and their replacement with black hirees."). An employee on the job has an important stake in his position with his employer. His financial affairs and other obligations will be arranged around certain settled expectations that his paychecks will continue. The coercion and control that an employer may exercise over an employee by threat of termination is great. On the other hand, an applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income.

Likewise, absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges. While a person denied a promotion or transfer will certainly be disappointed and may remain in a lower-paying position, he still retains his job and his ability to meet his financial obligations.

The Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), which upheld patronage hiring practices against First Amendment attack. The plaintiff in *Avery* unsuccessfuly applied for positions in three different county departments controlled by Republicans. The department heads filled vacancies with friends and relatives and

with friends and relatives of their political supporters. Of the 432 persons hired in the three departments over a seven-year period, only ten were Democrats. The plaintiff did not receive a job because she was not connected to the patronage network. The three department heads testified at their depositions that they preferred hiring Republicans. One testified that he "would favor hiring qualified Republicans." Another stated that "All things being equal I prefer to have a Republican working for me because I assume that he will be more interested in taking part in helping me get reelected." The third stated that "It just works better when people have the same philosophy." The district court granted summary judgment to the defendants because, among other reasons, *Elrod* and *Branti* did not extend to politically motivated hirings.

The Sixth Circuit affirmed. The court found that the First Amendment did not forbid a patronage system that relies on family, friends, and political allies for recommendations. While the court stated that a public employer could not bar a person from employment "solely" because of his political affiliation, the employer could rely on political factors in making decisions. The Sixth Circuit reasoned that the challenged patronage system was markedly different from public employer actions that the Supreme Court had declared unconstitutional. The challenged patronage system had many legitimate purposes such as finding good employees, extending political and personal friendships, and enhancing the official's performance and political appeal. Moreover, the court noted that any rule forbidding an employer from considering political affiliation in hiring would require invalidating hiring practices in public offices nationwide.

When balanced against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee, other interests strongly weigh against broadly expanding the rule *Branti* and *Elrod* enun-

ciated. In a representative government, courts must afford the political process and political institutions great deference. Extending *Branti* and *Elrod* to virtually all employment decisions would raise profound questions concerning democratic institutions that this court has previously found beyond our competence to answer. *See LaFalce*, 712 F.2d at 294.

Moreover, using political considerations in employment decisions is as old as this country. Although the age of a particular practice does not immunize it from constitutional challenge, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1955), "[i]f a thing has been practiced for two hundred years, it will need a strong case for the Fourteenth Amendment to effect it." *Jackman v. Rosenbaum*, 260 U.S. 22 (1922) (Holmes, J.). Thus, it is not irrelevant to our inquiry that George Washington and Thomas Jefferson were no strangers to either patronage hiring or the First Amendment. *See Elrod*, 427 U.S. at 377-78 (Powell, J., dissenting). The more widespread use of patronage, beginning with Andrew Jackson and extending to modern times, has been credited with increasing the level of paticipation in American politics. *Id.* at 377-80. By increasing the level of participation in American politics, patronage has also been credited with adding balance and stability to government. *Id.; see also Branti*, 445 U.S. at 526-32 (Powell, J., dissenting). As Justice Powell has stated in support of patronage practices, even when they included termination:

> Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when

> candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy."

Branti, 445 U.S. at 352 (Powell, J., dissenting).

Finally, we note that the practical considerations that this court relied on in *LaFalce* are even more compelling in this case. Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped "Democratic" and "Republican." A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether "politics" could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals. The Supreme Court has shown great reluctance to have the federal courts preside as a platonic guardian over state employment systems. *See Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."); *Connick v. Meyers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."). By asking that we review virtually every significant employment decision for absolute political neutrality, plaintiffs essentially ask that we constitutionalize civil service and then preside over the system. This would be an unprecedented intrusion into the political affairs of the states and other branches of federal government. In the absence of a

clear indication from the Supreme Court, we will not take such a large step.

In sum, we believe *DeLong*'s analysis provides the appropriate inquiry in patronage cases involving practices other than the actual or threatened dismissal from employment. In the political world in which democratic institutions exist, courts should not interfere unless compelling reasons exist for doing so. Banning political considerations from all public service employment decisions, even if practical, would diminish the political will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment— separation of powers, are best left in the political arena.[4]

Having determined the appropriate analysis to apply to plaintiffs' claims, we must next determine whether, under that analysis, the district court properly dismissed those claims. Under Fed.R.Civ.P. 12(b)(6), a court may not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claims that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, a court must resolve all reasonable inferences in the plaintiff's favor. *See Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984). In light of the appropriate analysis and the stringent standards for Rule 12(b)(6) dismissals, we reverse the district court's decision to dismiss Standefer's, O'Brien's, Rutan's, and

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[4] All this is not to say that retaliatory harassment falling short of actual or constructive discharge is not actionable. We held in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982), that even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights. However, acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off.

Taylor's claims, and affirm the decision to dismiss Moore's claim.

Moore alleges that he applied for jobs that were awarded to less qualified but politically favored persons. The district court correctly dismissed this claim. As we explained above, rejecting an employment application does not impose a hardship upon an employee comparable to the loss of job. *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984) (plurality opinion); *see also Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).[5] Failing to obtain a particular position disappoints, but no more so than the plaintiff's failing to obtain employment in *Avery*, 786 F.2d at 36-37, the contractor's failing to obtain a contract in *LaFalce*, 712 F.2d at 294, or the independent contractors losing their working relationships with the state in *Horn v. Kean*, 796 F.2d at 674-75, and *Sweeney*, 669 F.2d at 545-46. Any burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim. While the wisdom of patronage hiring

[5] In *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), the Sixth Circuit indicated in dictum that hiring decisions based "solely" on party affiliation would violate the First Amendment. When faced with that dictum a two-member majority of another Sixth Circuit panel "reluctantly" reversed a district court's decision to dismiss a complaint in which a plaintiff alleged that a hiring decision was based "solely" on political considerations. *Messer v. Curci*, No. 85-5626 (6th Cir. Dec. 2, 1986) (available on Lexis), *vacated and rehearing en banc granted*, No. 85-5626 (6th Cir. Jan. 21, 1987) (available on Lexis). The majority believed the complaint failed to state a claim but decided for prudential reasons to follow *Avery*'s dictum. The third member of the panel dissented on the ground that the panel was not bound by the dictum and that the complaint failed to state a claim.
We agree with the panel in *Messer v. Curci* that it should not matter whether the complaint alleges that patronage was the "sole reason" or a "motivating reason." We do not believe the fact that Democrats filled 10 out of 422 available slots was dispositive on the issue of whether political factors may be taken into account by a public employer. *Avery* added this

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practices is certainly open to debate, the validity of such practices is something more appropriately addressed to the legislature than the courts.

Rutan's and Taylor's claims are more problematic than an employment applicant's claims. Rutan alleges that she has been denied promotions that went to less qualified but politically favored persons. Taylor alleges that he has been denied a promotion that went to a less qualified but politically favored person. He also alleges that he was denied a transfer because he did not have the support of the Republican Party chairmen in Fulton and Schuyler Counties. Although a close question, we believe the district court erred in dismissing those claims.

If we were reviewing this case after trial and the facts pled in the complaint constituted the only evidence in the record, we would affirm the district court's judgment. As discussed above, merely failing to transfer or promote an employee is significantly less coercive or disruptive than discharging an employee. However, dismissing a complaint under Fed.R.Civ.P. 12(b)(6) is proper only if it appears beyond doubt that a plaintiff can prove no facts to support his claim. While it may be highly unlikely that a person who is merely denied a transfer or promotion can prove that the decision was the substantial equivalent of a dismissal, we cannot make this determination as a matter of law based on the minimal facts contained in the complaint. We are particularly reluc-

[5] *continued*

dictum to reconcile its holding with the Supreme Court's holdings in *Keyishian* and *Wiemann* invalidating state laws banning Communists and other "subversives" from employment. These cases, however, are not controlling in the patronage area. Under the *Branti* and *Elrod* balancing test a completely different set of factors are involved in patronage cases.

tant to scrutinize the pleadings under freshly articulated standards. Whether a particular employment action is equivalent to a dismissal rests upon each case's facts and circumstances. *Cf. Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) (upholding finding of constructive discharge when aggravating circumstances led an employee to retire after being denied a promotion). If Rutan and Taylor can assert that some special circumstances present in their cases would have led a reasonable person to quit, they should be permitted to pursue any such claim.

We also note that both Rutan and Taylor appear to have remained in their positions after the challenged employment decision. This is certainly relevant in determining the severity of the impact of the challenged patronage decision but does not as a matter of law prevent Rutan and Taylor from proceeding with their claims. We agree with the position implicit in *DeLong* that a first amendment violation occurs when the burden placed upon a particular employee is substantially equivalent to a discharge. An employee could stay on the job and withstand very difficult circumstances that might cause others similarly situated to quit. Financial circumstances may not allow the person the luxury of resigning before finding other employment. That circumstances prevent an employee from resigning does not decrease the burden the employer has, in fact, placed upon him.

We emphasize that the issue is not whether partisan reasons entered into a particular employment decision. Rather, the issue is whether a partisan decision imposed such a burden upon a particular employee that it would have led a reasonable employee to quit. There are a wide variety of employment decisions made every day that result in disappointment to employees. For every person promoted there are several others who wish they had been. Federal court is not intended to be the final arbiter for every real or imagined slight claimed by disappointed employees. It is only when a

particular patronage practice could *reasonably* be thought to be the substantial equivalent of a dismissal that such a practice violates the First Amendment.

Standefer's and O'Brien's claims are more straightforward. Standefer alleges that he was laid off from a "temporary position" at the state garage in Springfield along with five other employees. The five other employees, who had the Republican Party's support were offered other state jobs. Standefer was not. Resolving all reasonable inferences from these facts in Standefer's favor, these allegations may support a claim that a public employer conditioned Standefer's continued employment with the State upon Standefer's political affiliation. This is the type of conduct found constitutionally impermissible in *Branti* and *Elrod*.

This is not to say that a laid-off employee is automatically entitled to be considered for other positions with the State, or even his old position, without patronage considerations being taken into account. Failing to rehire after layoff does not in and of itself violate the rule enunciated in *Elrod* and *Branti*. Many laid-off employees will stand essentially in the position of new job applicants when they seek a position. But not all employees will be in that position. If a formal or informal system exists for placing employees into other positions, that system must not include partisan political considerations that cause an employee to lose his employment with the state.

On remand, the court must consider all the facts and circumstances of Standefer's case with the ultimate inquiry being whether a politically motived failure to place Standefer in another position was the substantial equivalent of a termination from employment. In making this determination, we believe that several facts deserve special consideration. The district court should consider: whether the employment relationship was considered to be "temporary" rather than "permanent"; whether the "layoff" was merely the end of a

temporary position or whether it was a true layoff; whether employees had reasonable expectations of placement into other job positions upon layoff; whether the previous employment with the State was simply a minor factor considered with many others in an *ad hoc* process or whether it was essentially determinative in being placed in the new position; and, whether there was a substantial time lapse between the layoff and placement of other employees or whether the placement into other positions was made contemporaneously with the layoff. Although we have listed these facts, we do not purport to delineate every possible factor or the weight given to each factor. Rather, as stated above, the court must look at all the facts and circumstances with an eye towards ultimately determining whether failing to place Standefer in a position after layoff was substantially equivalent to firing him.

O'Brien alleges that he was laid off from a position at the Lincoln Development Center. He does not allege that he had any specific right to recall. But he does allege that, under the Center's policies, he could be recalled within two years, and if recalled, there would be no break in his seniority and other benefits. "Several months" after being laid off he received a position with the Department of Corrections in which he had no accrued seniority or benefits. In February of 1985 (apparently after he was working at the Department of Corrections), he was told by an administrator at the Center that he would be rehired if the Center received an exception to the "Hiring freeze." The Governor's office denied the request for an exception.

Laying off an employee suspends the employee's working relationship with an employer but does not usually terminate the relationship. Absent indications that an employee's layoff is "permanent," a layoff will typically involve some formal or informal expectation of being placed back in the position if, within some specified or reasonable time period,

the job becomes open once again. A person who has ordered his life around a particular job, built up experience and seniority in the position, and has a reasonable expectation of being recalled to that position stands in far different position than an employment applicant. After a layoff, a recall to the same job conditioned upon an employee's political affiliation is the type of inherently coercive conduct that *Branti* and *Elrod* found to violate the First Amendment.

There are some factors in O'Brien's case that take it beyond a straight failure to recall from layoff case. First, O'Brien does not allege that there was a general recall that he was left out of because he was not a Republican supporter. In fact, he does not even allege that his position was filled by anyone within the two-year recall period. Absent these facts he may have a difficult time proving his claims. Nonetheless, the allegation in the complaint that, absent political considerations, he would have been granted an "exception" to the "hiring freeze," and thus been reinstated into his job, is sufficient to state a claim for relief.

Second, O'Brien apparently held a position with the Corrections Department at the time he was denied an exception to the "hiring freeze." Thus, the alleged patronage system did not deny him employment altogether. Nonetheless, as discussed earlier, the fact that a person is on the state payroll does not automatically render the claim insufficient as a matter of law.

In sum, we affirm the district court's decision dismissing Moore's claim. We reverse the district court's decision dis-

missing the other plaintiffs' employment claims and remand for further proceedings consistent with this opinion.[6]

D. *Voter Challenges to Patronage Practices—Standing.*

Besides challenging the alleged patronage system as employees, plaintiffs, as voters, also claim that the patronage system deprived them of "equal access and effectiveness of elections." Plaintiffs allege that the patronage system gives Governor Thompson and his supporters a significant advantage over their opposition in elections. The district court never reached the merits of this claim on the ground that the plaintiffs lacked standing. We agree.

In *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1026 (1988), this circuit analyzed the standing requirement as applied to claims by candidates and voters challenging patronage hiring practices in Cook County, Illinois. In *Shakman*, the candidates and voters claimed that patronage hiring had the "purpose and effect" of giving incumbent Democratic officials a significant advantage in communicating with the electorate. The court rejected plaintiffs' claims, holding that the candidates and voters had no standing to challenge patronage hiring. In finding that the plaintiffs lacked standing, the court reasoned that the chain of causation between the challenged governmental activity and the alleged injury was too tenuous:

> [W]e find the line of causation between the appellant's activity and the appellee's asserted injury to be particularly attenuated. . . . [T]he line of causation depends upon countless individual decisions. Moreover, those countless individual decisions must depend upon . . . countless individual political assessments that those who are in power will stay in power. It is not the hiring policy itself which creates any advantage for the incumbents. Any other candidate is entirely free to assert that, if elected, he will follow the same policy. Any advantage obtained by the incumbent is obtained only if the potential workers make an independent evaluation that the incumbent, and not the opposition, will win. The plaintiffs will be at a disadvange if—and only if—a significant number of individuals seeking political job opportunities determines the 'ins' will remain the 'ins.'

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[6] On remand the district court should also "as soon as practicable" consider whether the individual employees' claims may properly be brought as a class action. Fed.R.Civ.P. 23(c). In view of the individualized determinations necessary to resolve the claims, the district court should carefully scrutinize the claims before deciding to certify any class. *See generally General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).
We also note that defendants have argued on appeal that they are entitled to qualified immunity from damages. Such a request is more appropriately addressed to the district court on remand.

Id. at 1397. The court also noted that so many factors, many not even capable of articulation, determine a person's political activity that the plaintiffs could not say that their alleged injuries were "fairly traceable" to the defendant. *Id.; see also Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980) (no standing for supporters of President Carter's primary opponent to challenge Carter Administration award of 275,000 census jobs allegedly conferred on a political patronage basis).

Here, plaintiffs' standing argument is no different from that rejected in *Shakman*. In fact, plaintiffs made clear that their claims are virtually the same claims that the district court held sufficient to confer standing in *Shakman* (which was reversed after oral argument in this case). *See Shakman*, 481 F.Supp. 1315 (N.D. Ill. 1979), *rev'd in relevant part*, 829 F.2d 1387 (7th Cir. 1987). Like the plaintiffs in *Shakman*, plaintiffs contend that patronage has created an advantage in favor of the incumbents.

This does not confer standing on voters. The causal link between "loss" in their votes' impact and the challenged actions is too tenuous. Indeed, plaintiffs' statewide challenge

presents a more tenuous causal relationship than the challenge mounted by voters *and* candidates in *Shakman* to patronage hiring in a single county. Because the injury asserted in the complaint is not fairly traceable to the challenged action, the district court properly dismissed plaintiffs' claims as voters for lack of standing.

Each side shall bear its own costs.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

With respect to the patronage hiring claim of James Moore, I agree with the result reached by the majority though not necessarily with all the reasoning. It seems to me that removing politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts. At least the task should not be undertaken without some clearer signal from the Supreme Court. How to square this conclusion with the extensive first amendment jurisprudence which has grown up around political *discharges* is an even more daunting challenge, although *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), may point the way— at least for the time being. Patronage hiring practices are of great antiquity. There may be *some* good in them in *some* circumstances but, most importantly, rooting them out is something the federal courts could not accomplish without incurring straggering and, I should think, clearly disproprotionate costs. The patronage hiring practices involved here seem unvarnished and redolent of another era. They could, however, be dealt with by a properly designed civil service system. This is not a job for the federal courts—*yet*.

With respect to unfavorable personnel actions falling short of discharge involving existing employees, I agree with Judge Ripple and would rely on his persuasive partial dissent to the original panel opinion, 848 F.2d 1396, 1412 (7th Cir. 1988), as well as on his separate opinion here. It strikes me also as unrealistic to require plaintiffs to show that they were treated badly enough to quit, but for some reason did not. I would also follow *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987) (extending *Elrod* to any "disciplinary action" imposed for the exercise of first amendment rights), rather than *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980) (limiting *Elrod* to actions "substantially equivalent to dismissal"). We are already deeply into the business of protecting the first amendment rights of those who are already public employees and here I think we should follow the logic of our cases rather than attempt to draw the line quite unrealistically at constructive discharges.

For all these reasons I respectfully dissent to the extent indicated.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part. In this bobtailed[1] en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F.2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. *Id.* at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh,

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1 *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 615 (1975) (Blackmun, J., dissenting).

and Atlanta can expect protection when a local politician makes life uncomfortable because they do not knuckle under to his political will—even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual."

The need for Supreme Court review of this important question is evident. American citizens serving their county in state and local government ought not have their legal protection depend on the accident of where Congress decided to draw the administrative line separating one circuit from another. Review on certiorari is particularly appropriate in this case because the majority's reasoning depends, to a great extent, on its disagreement with the governing precedent of the Supreme Court. *See* Supreme Court Rule 17.1(c) (certiroari appropriate "[w]hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court"). It may be that the majority has perceived correctly the winds of change. But change must come from the Supreme Court, not a regional court of appeals. For us, stare decisis must be the governing principle.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2073
CYNTHIA RUTAN, et al.,

Plaintiffs-Appellants,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, Danville Division
No. 85-2369—**Harold A. Baker**, *Chief Judge*

ARGUED APRIL 7, 1987—DECIDED JUNE 8, 1988

Before COFFEY, RIPPLE, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. Plaintiffs appeal the district court's dismissal of their complaint challenging a public employer's use of political considerations in hiring, rehiring, transferring, and promoting employees. *See Rutan v. Republican Party of Illinois*, 641 F.Supp. 249 (C.D. Ill. 1986). We affirm in party, reverse in party, and remand.

I.
NATURE OF THE CASE

This basis of plantiffs' complaint is that Governor James R. Thompson of Illinois, the Republican Party of Illinois, and various state and Republican Party officials use political considerations in hiring, rehiring from layoffs, transferring, and promoting state employees under Governor Thompson's jurisdiction. Because we are reviewing the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted, we take the allegations in the complaint as true. *See LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377, 379 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

According to the complaint, approximately 60,000 state employees work in more than fifty "departments, boards and commissions under the jurisdiction" of Governor Thompson. On November 12, 1980, Governor Thompson issued an executive order "which requires his personal approval or that of a designee before any individual may be hired or promoted...." The executive order, which is attached to the complaint, states:

> HIRING FREEZE
>
> Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All hiring is frozen*. There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

(Emphasis in original.) Governor Thompson has assigned power over significant employment decisions to the "Governor's Office of Personnel." Plaintiffs contend that the employment decisions made by the Governor's Office of Personnel are:

> ...substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican Party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.

This patronage employment system, plaintiffs claim, creates a significant political advantage "in favor of the 'ins,' i.e., Defendant James Thompson and his political allies, and against the 'outs,' i.e., those who may wish to challenge in elections."

The defendants are Governor Thompson, the Illinois Republican Party, seven current or former state officials and two Republican Party officials. Plaintiffs sued two of the state officials as class representatives, one as a representative of all "Directors, Heads or Chief Executive Officers . . . since February 1, 1981" of state agencies under the Governor's jurisdiction and the other as a representative of all persons who acted as "liaisons" between those state agencies and the Governor's Office of Personnel. Plaintiffs sued the Republican Party officials as representatives of the class of "all Republican State Central Committee and County Central Committee officials and members . . . since February 1, 1981."

Plaintiffs brought this action both as individuals and as representatives of six different classes. These classes are: (1) voters; (2) taxpayers; (3) politically unacceptable employees denied promotions; (4) politically unacceptable employees denied transfers; (5) politically unacceptable employees who have not been rehired after being laid off; and (6) politically unacceptable employment applicants who have applied for but not received a job.

Plaintiff Cynthia Rutan has worked for the Department of Rehabilitative Services since 1974. She has neither been active in the Republican Party nor supported Republican candidates. Since 1981, Rutan has applied for promotion into supervisory positions in the Department of Rehabilitative Services. Defendants allegedly filled each of these supervisory positions with someone less qualified but "favored on a political basis by the Governor's Office of Personnel." Rutan sued on her own behalf and as a class representative of those denied promotions as a result of the patronage system.

Plaintiff Franklin Taylor works for the Department of Transportation. He does not support the Republican Party. In 1983, Taylor applied for a promotion. A less qualified person, whom the Fulton County Republican Party supported, received the promotion. Taylor subsequently requested a transfer to a different county. Taylor was allegedly advised that he was not transferred because the Republican Party Chairmen of Fulton and Schuyler Counties opposed the transfer. He sued on his own behalf and as a class representative of those denied promotions and transfers as a result of the patronage system.

Plaintiff Ricky Standefer was hired in a temporary position at the State Garage in Springfield in May, 1984. In November of that year, he and five other employees were laid off. The five other employees, who had Republican Party support, were offered other state jobs. Standefer, who

had voted in the Democratic Party primary, was not. He sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff Dan O'Brien was employed as a "Dietary Manager I" at the Department of Mental Health and Developmental Disabilities' Lincoln Development Center. O'Brien has voted only once in a primary, and that was in a Democratic Party primary. O'Brien was laid off on April 5, 1983. Under the "rules of the Department of Central management Services," a laid off employee can be recalled within two years. If recalled, the employee's benefits continue and he does not lose seniority. "[R]ecall within that time period means no loss of seniority and continuation of other employment benefits." In December of 1984, an administrator at the Lincoln Development Center told O'Brien that he would be recalled. The administrator stated, however, that he was waiting to receive the necessary exception to Governor Thompson's hiring freeze. In February of 1985, O'Brien was told that the Governor's Office had denied him an exception to the freeze. "Several months" after being laid off, O'Brien attempted to and "ultimately" did receive employment with the Department of Corrections. He obtained this job after obtaining the support of the Chairman of the Logan County Republican Party. This job paid less money than his previous job. O'Brien sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff James Moore "has sought employment with the State of Illinois particularly with the Department of Corrections" since 1978. In 1980, Moore received a letter from a Republican State representative informing him that he would have to "receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office." Moore alleges that while he was attempt-

ing to obtain a position with the State, "the son of the current Chairman of the Pope County Republican Central Committee, . . . the son-in-law of the Vice-Chairman and precinct committeewoman of the Pope County Republican Central Committee," and a Republican precinct committeeman were hired by the State in positions for which Moore was qualified. Moore sued on his own behalf and on behalf of all those denied employment as a result of the patronage system.

Plaintiffs also brought claims as voters and taxpayers. They claimed to represent a class of voters "who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters." They also claimed to represent a class of taxpayers who "are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent on the operation and maintenance of a State political patronage system." As voters, plantiffs claimed that the patronage system has diminished the value of their votes, thus denying them "a voice in government of equal effectiveness with other voters." As taxpayers, plaintiffs claimed to have been deprived of tax "monies . . . which have been expended for the support of the patronage system and not for a governmental purpose."

Plaintiffs sought relief under numerous federal and state law theories. *See Rutan*, 641 F.Supp. at 252-59. On appeal we are concerned with two: (1) their claims as employees or potential employees that the patronage system violated their rights under the First Amendment as applied to the states through the Fourteenth Amendment; and (2) their claims as voters that the patronage employment system violated the Fourteenth Amendment by denying them equal access and

effectiveness in elections.[1] In their prayer for relief, plaintiffs sought over a billion dollars in damages and requested that the district court transfer the Governor's control over the state employment system to a federal receiver.

Defendants moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6) on the ground that it failed to state a claim for relief. The district court granted defendants' motion. *See Rutan*, 641 F.Supp. 249 (C.D. Ill. 1986). This appeal ensued.

II.
ANALYSIS

A. *The District Court's Nonconsideration Of The Class Action Question.*

Before addressing the substantive issues raised on this appeal, we must first address the district court's failure to consider whether plaintiffs may properly bring this case as a class action. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted but did not first consider whether the

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1 In the portion of their brief denominated "Statement of Questions," plaintiffs did purport to raise an equal protection claim in their capacities as employees and employment applicants. Plaintiffs' employment claims, however, rise and fall on their First Amendment claims because the arguments in the brief are argued solely under the First Amendment. Whatever its merits, plaintiffs' failure to argue their equal protection claim waived that claim. *See Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 933 (1987).

Plaintiffs also appeal the district court's dismissal of their state law claims brought as taxpayers for lack of pendent jurisdiction. Because we remand the employment claims of four plaintiffs the district court should consider on remand whether it should exercise pendent jurisdiction over those state law claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Any consideration of those claims should also, as with all claims brought in federal court, analyze whether plaintiffs have standing to bring those claims.

action may be properly brought as a class action. This violates Fed.R.Civ.P. 23(c)(1), which requires the district court to address the issue of class certification "as soon as practicable." *See Hickey v. Duffy*, 827 F.2d 234, 237 (7th Cir. 1987); *Bennett v. Tucker*, 827 F.2d 63, 66-67 (7th Cir. 1987). The district court's failure to address the class action issue does not deprive us of jurisdiction under 28 U.S.C. § 1291. The district court's order dismissed the suit in its entirety, leaving nothing to be decided in that court. *See Hickey*, 827 F.2d at 238; *see also Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987). Thus even though the district court should have addressed the class action issue, its failure to do so does not destroy the finality of its decision.

The failure to address the class action issue, however, does limit the scope of our judgment. Because no class of plaintiffs or defendants was certified, only the named plaintiffs and named defendants are before this court. *See Hickey*, 827 F.2d at 238 (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). Therefore, we treat plaintiffs' claims as being brought solely by the named plaintiffs against the named defendants. *See Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *see also Phara v. Smith*, 621 F.2d 656, 663-64 (5th Cir.), *rehearing granted in party and modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980) (per curiam).

B. *Patronage Employment Claims*

Plaintiffs' employment claims challenge the validity of a longstanding feature of the American political landscape. They each claim that they did not receive some favorable employment decision because the defendants' employment decisions were substantially motivated by political considerations. Plaintiffs argue that the defendants placed an unconstitutional burden on their freedom of belief and association guaranteed by the First Amendment by relying

upon political considerations in making employment decisions. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.") On the other hand, defendants argue that the district court properly dismissed plaintiffs' claims because the First Amendment does not require absolute political neutrality by a public employer in making employment decisions. According to defendants public employer patronage practices violate the First Amendment only if an employee whose party affiliation is not a necessary requirement for his job is discharged or threatened with discharge. Thus, we must resolve two issues in addressing these claims: (1) whether, and to what extent, a public employer may take political affiliation into account in making employment decisions; and (2) whether, under the appropriate substantive rule, the district court properly dismissed plaintiffs' claims.

For years, the hiring and retention of public employees rested exclusively within the realm of legislative and executive discretion. A public employee's challenge to a particular employment practice that affected his free expression was met with Justice Holmes' famous pronouncement as a member of the Supreme Judicial Court of Massachusetts that, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892); *see generally Connick v. Myers*, 461 U.S. 138, 143-44 (1983). The latter half of this century has seen a broad expansion of the rights of employees and a corresponding diminution of the discretion exercised by the legislative and executive branches of government. *See Connick*, 461 U.S. at 143-47. The Supreme Court has struck down state laws that required public employees to take an oath denying past or present affiliation with the Communist Party, or other "subversive" organizations, *Wieman v. Updegraff*, 344 U.S. 183 (1952), as well as laws that barred members of the Com-

munist Party and other "subversive" organizations from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Other cases have firmly established that a public employee may not be discharged for speaking out on matters of public concern. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, retribution short of discharge that is directed at an employee's speech has also been held to violate the First Amendment. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

Although broad, public employees' First Amendment rights are not absolute. The First Amendment requires an employee's interest in free expression to be balanced against the legitimate interests of the state served by the challenged practice. *See Pickering*, 391 U.S. at 568; *cf. Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, discharging an employee whose complaints about the workplace disrupt the workplace and undermine a supervisor's authority does not violate the First Amendment. *See Connick*, 461 U.S. at 150-54 (1983). Similarly, public employer work rules that are legitimately related to the workplace's effective functioning and "not aimed at particular parties, groups or points of view" do not violate the First Amendment even though the rules may negatively affect employees' speech or political association. *See Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (upholding Hatch Act restrictions on political activities by federal employees); *cf. Bart*, 677 F.2d at 624-25 (upholding rule requiring employee-candidate to take leave of absence while campaigning).

There are few areas where the balancing of interests under the First Amendment analysis is more sharply debated, or more uncertain, than the area of political patronage in employment. The Supreme Court first addressed the validity of patronage employment practices in *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, the newly-elected sheriff of Cook County, Illinois, a Democrat, succeeded a Republican in that

office. The new sheriff discharged some of the incumbent employees and threatened to discharge others because they were not affiliated with or sponsored by the Democratic Party. A divided Supreme Court held that this practice violated the First Amendment.

Drawing heavily upon *Keyishian* and *Pickering*, a plurality of three justices stated that the patronage dismissals unnecessarily restricted political belief and association and that "any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms." 427 U.S. at 372-73 (plurality). Although generally unimpressed with patronage practices, the plurality did limit its consideration of the issues to patronage dismissals and not to other patronage practices. *Id.* at 353 (plurality). Moreover, Justice Stewart's concurrence (in which Justice Blackmun joined) expressly limited the Court's holding to cases where, solely on the basis of political belief, a nonpolicymaking, nonconfidential employee is discharged or threatened with discharge from a job that he is satisfactorily performing. 427 U.S. at 375 (Stewart, J., concurring).

The Court next addressed patronage employment in *Branti v. Finkel*, 445 U.S. 507 (1980), and slightly modified its holding in *Elrod*. In *Branti*, two Republican assistant public defenders sued after a newly-elected Democratic public defender threatened them with discharge. The Court ruled for the assistants, holding that a public employer cannot discharge an employee based on party affiliation unless "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Again, the Court expressly limited its consideration of the issues to patronage dismissals. *Id.* at 513 n.7.

In light of the limited nature of the Supreme Court's holdings in *Branti* and *Elrod*, the courts of appeals have been generally hesitant to extend the rule enunciated in those

cases. In *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this circuit affirmed the dismissal of a complaint filed by a contractor who brought suit alleging that a mayor violated the contractor's First Amendment rights by rejecting the contractor's bid for a city contract because the contractor did not support the mayor politically. In reaching its conclusion, the *LaFalce* court balanced the interference with political expression caused by the patronage practice against "the consequences of trying to prevent [the interference] through an interpretation of the Constitution." *Id.* at 293-94.

The court first found that a contractor's loss of a particular bid was less disruptive than an employee's loss of a job; a contractor still has other potential contracts to bid on. Moreover, the interference was not likely to affect many businesses, given that most stay on good terms with all major political parties. *Id.* at 294.

The court then determined that the costs of attempting to interfere with the patronage practices outweighed any interference with political affiliations.

> [A]gainst the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws, . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaigns, and decisions such as *Elrod* and *Branti* have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it still further raises

> profound questions of political science that exceed judicial competence to answer . . .

Id. The court also expressed concern that public officials would be subject to suit by disappointed bidders each time the city awarded a bid. Finally, the court expressed reluctance to "take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*." *Id.* at 294-95; *see also Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors, not employees, held not to violate First Amendment); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.) (partisan dismissals of "fee agents" who were independent contractors held not to violate First Amendment), *cert. denied*, 459 U.S. 878 (1982).

In the employment context, the courts of appeals have extended *Branti* and *Elrod* beyond outright discharges and threats of discharges. For example, the courts have held that a partisan decision not to allow an employee to retain his job after the employee's "official" term of employment expires may violate the First Amendment. *See, e.g., McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3789 (U.S. May 17, 1988) (No. 87-1424) *Cheveras Pachecho v. Rivera Gonzalez*, 809 F.2d 125 (1st Cir. 1987); *Furlong v. Gudknecht*, 808 F.2d 233 (3rd Cir. 1986); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc). An open question remains, however, over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment.

In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the Fourth Circuit limited employees' challenges to patronage practices to those practices that "can be determined to be the substantial equivalent of dismissal." *Id.* at 624. In that case, the plaintiff, a Republican, challenged his transfer and reassignment from his position as State Director of the Farmers

Home Administration in Maine to a position as a project assistant in Washington, D.C. The plaintiff had been transferred and reassigned as part of a policy of the Secretary of Agriculture to replace Republican state directors with Democrats.

The district court granted the government summary judgment on the ground that plaintiff's position as a state director was a "policymaking" position. On appeal, the Fourth Circuit reversed and remanded the case to be considered under *Branti*'s newly articulated test that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Delong*, 621 F.2d at 622. In so holding, the court rejected the government's argument that the patronage reassignment and transfer of an employee protected under *Branti* and *Elrod* could never constitute an unconstitutional burden upon an employee's beliefs and associations. The court did, however, limit such challenges to those patronage practices which, while not an actual or threatened discharge, could be considered tantamount to a dismissal. *Id.* at 623-24. In pertinent part the court reasoned:

> Dismissal or the threat of dismissal for political patronage reasons is of course the ultimate means of achieving by indirection the impermissible result of a direct command to a government employee to cease exercising protected rights of free political association and speech. This is *Elrod*'s and *Branti*'s specific, narrow application of the principle. We believe that when the principle is applied to patronage practices other than dismissal it is rightly confined to those that can be determined to be the substantial equivalent of dismissal.
>
> In applying the principle, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount

> to outright dismissal. This much and no more, we conclude, is a necessary implication from the broader principle drawn upon in *Elrod* .... It is obvious that not every reassignment or transfer can fairly be throught to have this quality. It is equally obvious that in practical terms some might.

Id.

The "substantial equivalent of dismissal" standard focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave his job. *See, e.g., Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1145 (1985). In the course of most, if not all, persons' employment there are a wide variety of disappointments and possibly some injustices. Most of these are normal incidents of employment that could not be said to lead a reasonable person to quit. *See Bristow v. The Daily Press, Inc.*, 770 F.2d 1251, 1256 n.4 (4th Cir. 1985) (denial of promotion in and of itself cannot constitute a constructive discharge), *cert. denied*, 475 U.S. 1082 (1986); *Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F.Supp. 666 (N.D. Cal. 1980) ("An employer has not effected a constructive discharge merely because an employee believes that she has . . . limited opportunities for advancement . . . . "). However, whether a particular action can be viewed as "substantially equivalent to a dismissal" (or a constructive discharge) is not subject to hard and fast rules. All the circumstances of a case must be taken into account.[2]

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[2] Many constructive discharge cases in the employment discrimination area have required that the employer specifically intend for an employee to resign. *See, e.g., Bristow*, 770 F.2d 1251, 1255 (4th Cir. 1985) (ADEA). This appears to be an open question in this circuit. *See Henn v. National Geographic Society*, 819 F.2d 824, 829 (7th Cir.) (ADEA), *cert. denied*, 108 S.Ct. 454 (1987). *Delong* does not place any such requirements in patronage cases, nor do we think it would be appropriate to do so. *Branti, Elrod*, and *Delong* all focus on the burden a patronage system places on an employee, not on the employer's intent to impose the burden.

Being placed in a sinecure may be some employees' idea of the ultimate job. For other employees, enforced idleness may be a humiliating experience as well as one that may permanently impair their professional skills. *See Parrett*, 737 F.2d at 694. Moreover, there may be special circumstances that sharply increase the severity of impact of what might otherwise be viewed as a routine employment decision. Under the *Delong* analysis these may all be taken into account. *Delong*, 621 F.2d at 624. The ultimate issue remains, however, whether a particular patronage decision "imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal." *Id.*

In contrast to the Fourth Circuit's analysis in *Delong*, the Third Circuit has recently held that the rule enunciated in *Branti* and *Elrod* extends to any "disciplinary action" by a public employer. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), a group of police officers brought suit against several defendants. The officers alleged that the defendants demoted them for engaging in political activity, or alternatively, that the defendants demoted them to make room for the new mayor's political supporters. On appeal, the defendants argued that the plaintiffs' claims that they were demoted to make room for political supporters failed as a matter of law. The defendants contended that the rule enunciated in *Branti* and *Elrod* was strictly limited to patronage discharges and did not extend to practices that placed lesser burdens on the plaintiffs' associational interests. The Third Circuit rejected both this argument and the "substantial equivalent to dismissal" standard set forth in *Delong. Id.* at 731 n.9. According to the Third Circuit, the rule enunciated in *Elrod* and *Branti* was not limited by the harshness of a particular action but rather extended to the imposition of any "disciplinary action" imposed for the exercise of First Amendment rights. *Id.* at 731.

Delong and *Bennis* enunciate significantly different standards for analyzing patronage claims. *Delong* limits the rule enunciated in *Branti* and *Elrod* to constructive discharges. On the other hand, *Bennis* apparently extends the rule to a wide range of employment decisions, including decisions concerning routine transfers and promotions. We believe the *Delong* analysis is more sound.[3]

Delong properly extends the protections of *Branti* and *Elrod* beyond the narrow holdings of those cases to protect employees from patronage practices that may, as a practical matter, impose the same burden as the employees' outright termination. The *Delong* analysis, however, also properly takes into account the limited nature of the Court's holdings in *Branti* and *Elrod* and the fact that real differences exist between dismissals and other patronage practices. It also takes into account the substantial intrusion of the federal

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[3] In adopting the *Delong* analysis, we recognize that language in *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984), indicates that a public employer may never take political factors into account. In *Hermes* two police officers alleged that they were denied promotions because eligibility tests and examination scores were "rigged" to favor other candidates who had local political support. The district court granted summary judgment on the ground that there was no evidence that political affiliations entered into the decisions. On appeal, this court stated that "the district court's grant of summary judgment . . . will be sustained if the only reasonable inferences from the record are that [the allegedly politically-favored candidates] would have been promoted regardless of their political affiliations." 742 F.2d at 353. The court then affirmed the grant of summary judgment.

Defendants here distinguish *Hermes* on the ground that *Hermes* involved elements of retaliation, that is, "rigged" test scores and eligibility lists. We do not find that distinction persuasive. Whatever the effect such conduct may have on other rights, we do not believe the First Amendment issue turns on whether political factors are taken into account in an underhanded manner. Nonetheless, the language in *Hermes* does not control this case. The holding of a previous panel of this circuit is binding on other panels. Dictum is not. *See generally United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988). And the language in

(Footnote continued on following page)

courts into the political affairs of the states as well as the executive and legislative branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges.

By favoring political supporters or those who are connected with political supporters, a patronage system will unquestionably have some negative effects on those persons who do not support or are not connected with the party or faction in power. The partisan denial of a promotion, transfer, or employment application leaves someone in a worse position than he would have been absent patronage considerations. At the same time, however, the burden imposed by such patronage decisions is much less significant than the loss of a job.

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[3] *continued*

Hermes must be considered dictum. Because of its summary disposition of the case the panel did not, nor did it need to, test the merits of an extension of *Branti* and *Elrod*. The panel merely cited *Branti* and *Elrod* in a footnote for the undisputed proposition that the right not to associate is protected under the First Amendment. There is no discussion of the reluctance expressed in *LaFalce* to extend the holdings of *Branti* and *Elrod* or of the Fourth Circuit's decision in *Delong*. There is also no indication that, on appeal, the defendants challenged any unprecedented expansion of *Branti* and *Elrod*. If the patronage issue was necessary to its holding, the court would have gone into these issues in great detail. Moreover, we note that *Hermes* has not been cited in any patronage case decided by other circuits. Accordingly, because the language contained in *Hermes* is dictum, it does not control this case.

Furthermore, contrary to plaintiffs' suggestion, *Danenberger v. Johnson*, 821 F.2d 361 (7th Cir. 1987), does not support the proposition that patronage promotion decisions always violate the Constitution. In *Danenberger* the court upheld the dismissal of the plaintiff's complaint on the grounds of qualified immunity because no clearly established right to a promotional decision free of any political considerations existed at the time of the challenged promotion decision. *Id.* That the claim was dismissed on qualified immunity grounds in no way implies that such a constitutional right exists, *see Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986); it means only that there is no right, or *if* there is a right, it was not clearly established at the time at issue.

While we recognize that in a certain economic sense a person may be harmed as much by the failure to win a job as by the failure to keep one, we follow the plurality's approach in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). There the plurality stated that an affirmative action plan's discriminatory effects may be justified when it involves the loss of future employment opportunity but not when it involves the loss of a present position. The plurality reasoned that losing an employment opportunity is not as intrusive as losing an existing job. *Wygant*, 476 U.S. at 279-84 (plurality); *see also Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) ("The [affirmative action] plan does not require the discharge of white workers and their replacement with new black hirees."). An employee on the job has an important stake in his position with his employer. His financial affairs and other obligations will be arranged around certain settled expectations that his paychecks will continue. The coercion and control that an employer may exercise over an employee by threat of termination is great. On the other hand, an applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment with one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income.

Likewise, absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges. While a person denied a promotion or transfer will certainly be disappointed and may remain in a lower paying position, he still retains his job and his ability to meet his financial obligations.

The Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert.*

denied, 477 U.S. 905 (1986), which upheld patronage hiring practices against First Amendment attack. The plaintiff in *Avery* unsuccessfully applied for positions in three different county departments controlled by Republicans. The department heads filled vacancies with friends and relatives and with friends and relatives of their political supporters. Of the 432 persons hired in the three departments over a seven-year period, only ten were Democrats. The plaintiff did not receive a job because she was not connected to the patronage network. The three department heads testified at their depositions that they preferred hiring Republicans. One testified that he "would favor hiring qualified Republicans." Another stated that "all things being equal I prefer to have a Republican working for me because I assume that he will be more interested in taking part in helping me get re-elected." The third stated that "it just works better when people have the same philosophy." The district court granted summary judgment to the defendants on, among other grounds, the ground that *Branti* and *Elrod* did not extend to politically motivated hirings.

The Sixth Circuit affirmed. The court found that the First Amendment did not forbid a patronage system that relies on family, friends, and political allies for recommendations. While the court stated that a public employer could not bar a person from employment "solely" because of his political affiliation, the employer could rely on political favors in making decisions. The Sixth Circuit reasoned that the challenged patronage system was marked different from public employer actions that the Supreme Court had declared unconstitutional. The challenged patronage system had many legitimate purposes such as finding good employees, extending political and personal friendships, and enhancing the official's performance and political appeal. Moreover, the court noted that any rule forbidding an employer from considering political affiliation in hiring would require invalidating hiring practices in public offices nationwide.

When balanced against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee, other interests strongly weigh against broadly expanding the rule enunciated in *Branti* and *Elrod*. In a representative government, the courts must afford the political process and political institutions great deference. Extending *Branti* and *Elrod* to virtually all employment decisions would raise profound questions concerning democratic institutions that this court has previously found beyond our competence to answer. *See LaFalce*, 712 F.2d at 294.

Moreover, using political considerations in employment decisions is as old as this country. Although the age of a particular practice does not immunize it from constitutional challenge, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954), "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.). Thus, it is not irrelevant to our inquiry that George Washington and Thomas Jefferson were no strangers to either patronage hiring or the First Amendment. *See Elrod*, 427 U.S. at 377-78 (Powell, J., dissenting). The more widespread use of patronage, beginning with Andrew Jackson and extending to modern times, has been credited with increasing the level of participation in American politics. *Id.* at 377-80. By increasing the level of participation in American politics, patronage has also been credited with adding balance and stability to government. *Id.; see also Branti*, 445 U.S. at 526-32 (Powell, J., dissenting). As Justice Powell has stated in support of patronage practices:

> Broadbased political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special

> interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy.

Branti, 445 U.S. at 532 (Powell, J., dissenting).

Finally, we note that the practical considerations relied on by this court in *LaFalce* are even more compelling in this case. Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped "Democratic" and "Republican." A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether "politics" could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals. The Supreme Court has shown great reluctance to have the federal courts preside as "Platonic Guardians" over state employment systems. *See Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("[F]ederal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.") By asking that we review virtually every significant employment decision for absolute political neutrality, plaintiffs essentially ask that we constitutionalize civil service and then preside over the system. This would be an unprecedented intrusion

into the political affairs of the states as well as the executive and legislative branches of the federal government. In the absence of a clear indication from the Supreme Court, we will not take such a large step.

In sum, we believe *Delong*'s analysis provides the appropriate inquiry in patronage cases involving practices other than the actual or threatened dismissal from employment. In the political world in which democratic institutions exist, courts should not interfere unless compelling reasons exist for doing so. Banning political considerations from all public service employment decisions, even if practical, would diminish the political will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment—separation of powers, are best left in the political arena.

Having determined the appropriate analysis to apply to plaintiffs' claims, we must next determine whether, under that analysis, the district court properly dismissed plaintiffs' claims. Under Fed.R.Civ.P. 12(b)(6) a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, a court must resolve all reasonable inferences in the plaintiff's favor. *See Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984). In light of the appropriate analysis and the stringent standards for Rule 12(b)(6) dismissals, we reverse the district court's decision to dismiss Standefer's, O'Brien's, Rutan's, and Taylor's claims, and affirm the decision to dismiss Moore's claim.

Moore alleges that he applied for jobs that were awarded to less qualified but politically favored persons. The district court correctly dismissed this claim. As we explained above,

rejecting an employment applications does not impose a hardship upon an employee comparable to the loss of job. *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984) (plurality opinion); *see also Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).[4] Failing to obtain a particular position disappoints, but no more so than the plaintiff's failing to obtain employment in *Avery*, 786 F.2d at 236-37, the contractor's failing to obtain a contract in *LaFalce*, 712 F.2d at 294, or the independent contractors' losing their working relationships with the state in *Horn*, 796 F.2d at 674-75, and *Sweeney*, 669 F.2d at 545-46. Any burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim. While the wisdom of patronage hiring practices is certainly open to debate, the validity of such practices is something more appropriately addressed to the legislature rather than the courts.

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[4] In *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), the Sixth Circuit indicated in dictum that hiring decisions based "solely" on party affiliation would violate the First Amendment. When faced with that dictum, a two-member majority of another Sixth Circuit panel "reluctantly" reversed a district court's decision to dismiss a complaint in which a plaintiff alleged that a hiring decision was based "solely" on political considerations. *Messer v. Curci*, No. 85-5626, slip op. (6th Cir. Dec. 2, 1986) (available on LEXIS), *vacated and rehearing en banc granted*, No. 85-5626 (6th Cir. Jan. 21, 1987) (order) (available on LEXIS). The majority believed the complaint failed to state a claim but decided for prudential reasons to follow *Avery*'s dictum. The third member of the panel dissented on the ground that the panel was not bound by the dictum and that the complaint failed to state a claim.

We agree with the panel in *Messer v. Curci* that it should not matter whether the complaint alleges that patronage was the "sole reason" or a "motivating reason." We do not believe the fact that Democrats filled 10 out of 432 available slots was dispositive on the issue of whether political factors may be taken into account by a public employer. *Avery* added this dictum to reconcile its holding with the Supreme Court's holdings in *Keyishian* and *Wieman* invalidating state laws banning Communists and other "subversives" from employment. These cases, however, are not controlling in the patronage area. Under the *Branti* and *Elrod* balancing test, different factors are involved in patronage cases.

The claims of Rutan and Taylor are more problematic than the claims of an employment applicant. Rutan alleges that she has been denied promotions that went to less qualified but politically favored persons. Taylor alleges that he has been denied a promotion that went to a less qualified but politically favored person. He also alleges that he was denied a transfer because he did not have the support of the Republican Party Chairmen in Fulton and Schuyler Counties. Although a close question, we believe the district court erred in dismissing these claims.

If we were reviewing this case after trial and the facts pleaded in the complaint constituted the only evidence in the record, the district court's judgment would be affirmed. As discussed above, merely failing to transfer or promote an employee is significantly less coercive or disruptive than discharging an employee. However, dismissing a complaint under Fed.R.Civ.P. 12(b)(6) is proper only if it appears beyond doubt that a plaintiff can prove no facts to support his claim. While it may be highly unlikely that a person who is merely denied a transfer or promotion can prove that the decision was the substantial equivalent of a dismissal, we cannot make this determination as a matter of law based on the minimal facts contained in the complaint. We are particularly reluctant to scrutinize Rutan's and Taylor's pleadings under freshly articulated standards. Whether a particular employment action is equivalent to a dismissal rests upon each case's facts and circumstances. *Cf. Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) (upholding finding of constructive discharge when aggravating circumstances led an employee to retire after being denied a promotion). If Rutan and Taylor can assert that some special circumstances present in their cases would have led a reasonable person to quit, they should be permitted to pursue any such claim.

We also note that both Rutan and Taylor appear to have remained in their positions after the challenged employment

decision. This is certainly relevant in determining the severity of the impact of the challenged patronage decision but does not as a matter of law prevent Rutan and Taylor from proceeding with their claims. We agree with the position implicit in *DeLong* that a First Amendment violation occurs when the burden placed upon a particular employee is substantially equivalent to a discharge. An employee could stay on the job and withstand very difficult circumstances that might cause others similarly situated to quit. Financial circumstances may not allow the person the luxury of resigning before finding other employment. That circumstances prevent an employee from resigning does not decrease the burden the employer has, in fact, placed upon him.

We emphasize that the issue is not whether partisan reasons entered into a particular employment decision. Rather, the issue is whether a partisan decision imposed such a burden upon a particular employee that it would have led a reasonable employee to quit. There are a wide variety of employment decisions made every day that result in disappointment to employees. For every person promoted there are several others who wish they had been. Federal court is not intended to be the final arbiter for every real or imagined slight claimed by disappointed employees. It is only when a particular patronage practice could *reasonably* be thought to be the substantial equivalent of a dismissal that such a practice violates the First Amendment.

Standefer's and O'Brien's claims are more straightforward. Standefer alleges that he was laid off from a "temporary position" at the State Garage in Springfield along with five other employees. The five other employees, who had the support of the Republican Party, were offered other state jobs. Standefer was not. Resolving all reasonable inferences from these facts in Standefer's favor, these allegations may support a claim that a public employer conditioned Standefer's continued employment with the State upon

Standefer's political affiliation. This is the type of conduct found constitutionally impermissible in *Branti* and *Elrod*.

This is not to say that a laid-off employee is automatically entitled to be considered for other positions with the state, or even his old position, without patronage considerations being taken into account. Failing to rehire after layoff does not in and of itself violate the rule enunciated in *Branti* and *Elrod*. Many laid-off employees will stand essentially in the position of new job applicants when they seek a position. But not all employees will be in that position. If a formal or informal system exists for placing employees into other positions, that system must not include partisan political considerations that cause an employee to lose his employment with the state.

On remand, the court must consider all the facts and circumstances of Standefer's case with the ultimate inquiry being whether a politically motivated failure to place Standefer in another position was the substantial equivalent of a termination from employment. In making this determination, we believe that several facts deserve special consideration. The district court should consider: whether the employment relationship was considered to be "temporary" rather than "permanent"; whether the "layoff" was merely the end of a temporary position or whether it was a true layoff; whether employees had reasonable expectations of placement into other positions upon layoff; whether the previous employment with the State was simply a minor factor considered with many others in an *ad hoc* process or whether it was essentially determinative in being placed in the new position; and, whether there was a substantial time lapse between the layoff and placement of other employees or whether the placement into other positions was made contemporaneously with the layoff. Although we have listed these facts, we do not purport to delineate every possible factor or the weight to be given to each factor. Rather, as

stated above, the court must look at all the facts and circumstances with an eye towards ultimately determining whether failing to place Standefer in a position after layoff was substantially equivalent to terminating his employment.

O'Brien alleges that he was laid off from a position at the Lincoln Development Center. He does not allege that he had any specific right to recall. But he does allege that, under the Center's policies, he could be recalled within two years, and if recalled, there would be no break in his seniority and other benefits. "Several months" after being laid off he received a position with the Department of Corrections in which he had no accrued seniority or benefits. In February of 1985 (apparently after he was working at the Department of Corrections), he was told by an administrator at the Center that he would be rehired if the Center received an exception to the "hiring freeze." The Governor's Office denied the request for an exception.

Laying off an employee suspends the employee's working relationship with an employer but does not usually terminate the relationship. Absent indications that the layoff of an employee is "permanent," a layoff will typically involve some formal or informal expectation of being placed back in the position if, within some specified or reasonable time period, the job becomes open once again. A person who has ordered his life around a particular job, built up experience and seniority in the position, and has a reasonable expectation of being recalled to that position stands in far different position than an employment applicant. After a layoff, a recall to the same job conditioned upon an employee's political affiliation is the type of inherently coercive conduct that *Branti* and *Elrod* found to violate the First Amendment.

There are some factors in O'Brien's case that take it beyond a straight failure to recall from layoff case. First, O'Brien does not allege that there was a general recall that he was left out of because he was not a Republican sup-

porter. In fact, he does not even allege that his position was filled by anyone within the two-year recall period. Absent these facts, he may have a difficult time proving his claims. Nonetheless, the allegation in the complaint that, absent political considerations, he would have been granted an "exception" to the "hiring freeze," and thus been reinstated into his job, is sufficient to state a claim for relief.

Second, O'Brien apparently held a position with the Corrections Department at the time he was denied an exception to the "hiring freeze." Thus, the alleged patronage system did not deny him employment altogether. Nonetheless, as discussed earlier, the fact that a person is on the state payroll does not automatically render the claim insufficient as a matter of law.

In sum, we affirm the district court's decision dismissing Moore's claim. We reverse the district court's decision dismissing the employment claims of the other plantiffs and remand for further proceedings consistent with this opinion.[5]

D. *Voter Challenges to Patronage Practices—Standing.*

In addition to challenging the alleged patronage system as employees, plaintiffs, as voters, also claim that the patronage system deprived them of "equal access and effectiveness of elections." Plaintiffs allege that the patronage system gives Governor Thompson and his supporters a significant ad-

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[5] On remand the district court should also "as soon as practicable" consider whether the individual employees may properly bring their claims as class actions. Fed.R.Civ.P. 23(c). In view of the individualized determinations necessary for the resolution of the claims, the district court should carefully scrutinize the claims before deciding to certify any class. *See generally General Telephone Co. v. Falcon*, 457 U.S. 147 (1982)

We also note that defendants have argued on appeal that they are entitled to qualified immunity from damages. Such a request is more appropriately addressed to the district court on remand.

vantage over their opposition in elections. The district court never reached the merits of this claim on the ground that the plaintiffs lacked standing. We agree.

In *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1026 (1988), this circuit analyzed the standing requirement as applied to claims by candidates and voters challenging patronage hiring practices in Cook County, Illinois. In *Shakman*, the candidates and voters claimed that patronage hiring had the "purpose and effect" of giving incumbent Democratic officials a significant advantage in communicating with the electorate. The court rejected plaintiffs' claims, holding that the candidates and voters had no standing to challenge patronage hiring. In finding that the plaintiffs lacked standing, the court reasoned that the chain of causation between the challenged governmental activity and the alleged injury was to tenuous:

> [W]e find the line of causation between the appellants' activity and the appellees' asserted injury to be particularly attenuated. . . . [T]he line of causation depends upon countless individual decisions. Moreover, those countless individual decisions must depend upon . . . countless individual political assessments that those who are in power will stay in power. It is not the hiring policy itself which creates any advantage for the incumbents. Any other candidate is entirely free to assert that, if elected, he will follow the same policy. Any advantage obtained by the incumbent is obtained only if the potential workers make an independent evaluation that the incumbent, and not the opposition, will win. The plaintiffs will be at a disadvantage if—and only if—a significant number of individuals seeking political job opportunities determined the 'ins' will remain the 'ins.'

Id. at 1397. The court also noted that so many factors, many not even capable of articulation, determine a person's political activity that the plaintiffs could not say that their alleged injuries were "fairly traceable" to the defendants. *Id.; see also*

Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980) (supporters of President Carter's primary opponent did not have standing to challenge Carter Administration award of 275,000 census jobs allegedly conferred on a political patronage basis).

Here, plaintiffs' standing argument is no different from that rejected in *Shakman*. In fact, plaintiffs made clear that their claims are virtually the same claims the district court held sufficient to confer standing in *Shakman* (which was reversed after oral argument in this case). *See Shakman*, 481 F.Supp. 1315 (N.D. Ill. 1979), *rev'd in relevant part*, 829 F.2d 1387 (7th Cir. 1987). Like the plaintiffs in *Shakman*, plaintiffs contend that patronage has created an advantage in favor of the incumbents.

This does not confer standing on voters. The causal link between any "loss" in their votes' impact and the challenged actions is too tenuous. Indeed, plaintiffs' statewide challenge presents a more tenuous causal relationship that the challenge mounted in *Shakman* by voters *and* candidates to patronage hiring in a single county. Because the injury asserted in the complaint is not fairly traceable to the challenged action, the district court properly dismissed plaintiffs' claims as voters for lack of standing.

Each side shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part. I join that part of the court's judgment dismissing the plaintiffs' claims, brought as voters, which assert that the patronage system deprives them of "equal access and effectiveness of elections." R.1 at ¶ 24(d). As the majority notes, that aspect of this case is governed by our holding in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

I also concur in that portion of the judgment that remands the claims of Cynthia Rutan, Franklin Taylor, Rickey Standefer, and Dan O'Brien to the district court for further proceedings. However, I respectfully part company with my brothers on the appropriate test that ought to be applied upon remand. Today, the majority adopts the wooden analysis of *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), a test formulated immediately after the Supreme Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980), and one that has not gained respect in the other circuits that have had the time to take a more measured view of the holding of *Branti*. As the majority points out, the Third Circuit has explicitly disavowed the *Delong* approach in *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987). Moreover, this circuit and the Eleventh Circuit have also taken far more reasoned approaches to the analysis of *Branti* and *Elrod v. Burns* 427 U.S. 347 (1976), *See Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984); *Waters v. Chaffin*, 684 F.2d 833, 837 n.9 (11th Cir. 1982).[1]

Although the *Delong* test attempts to apply the *Elrod* criteria to cases not involving discharge, its approach is an illusory one. It places an unrealistic burden of proof on the

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[1] The *Delong* test has met a similar fate at the hands of a panel of the First Circuit. *See Agosto De Feliciano v. Aponte Roque*, No. 86-1300 (1st Cir. Aug. 14, 1987) (1987 U.S. App. LEXIS 10833). That opinion has now been vacated and the case has been reheard en banc. The matter is presently *sub judice*.

plaintiff and creates an impossible judicial task. To succeed, the plaintiff must establish that, although a reasonable person would resign under such pressure to his first amendment rights, he has decided to "hang on." It is not surprising that the *Delong* test would produce such an unrealistic burden of proof; it is premised on a fundamental misapprehension of the analysis required by established first amendment jurisprudence. As the Third Circuit noted in *Bennis*, "the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." 823 F.2d at 731 (footnote omitted). The government must establish that the particular restriction on first amendment freedoms which it desires to impose can be justified by the important needs of the government. *See Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *see also McGill v. Board of Educ. of Perkin Elementary School Dist. No. 108*, 602 F.2d 774, 780 (7th Cir. 1979). If the government cannot justify the need to restrict the first amendment freedoms of an individual for an important governmental reason, it may not impose any punishment on that individual for the exercise of his first amendment rights. By contrast, the majority's approach is simply a manifestation of its willingness to tolerate "minor punishment" for the legitimate exercise of first amendment rights. The majority tells the public employee that, even if the government has no legitimate need to curtail his first amendment rights, it may subject him to discrimination and any other form of abuse as long as it does not go too far and create a situation where a reasonable employee would say "enough" and resign. Such a statement of the law is simply not correct. *See Connick*, 461 U.S. at 142; *Branti*, 445 U.S. at 515 n.10. As this court noted in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their con-

stitutional rights it need not be great in order to be actionable."[2]

The majority's holding today will subject countless dedicated government workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clerical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may now be passed over for promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in

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[2] The analysis appropriate for infringements on freedom of speech also applies to associational rights. As the Supreme Court noted in *Perry v. Sindermann*, 408 U.S. 593 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person *because of his constitutionally protected speech or associations*, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 426. Such interference with constitutional rights is impermissible.

Id. at 597 (emphasis supplied).

Even if we assume, arguendo, that more of a burden is permissible when we are dealing with the implied right of freedom of association rather than the explicit right of free speech, the threatened loss in this case is clearly sufficiently burdensome to amount to a substantial burden on the plaintiffs' first amendment rights. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

identical fashion. This growing acceptance of infringements on first amendment rights on the ground that the curtailment is minor is indeed a disturbing trend. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way . . . ." *Boyd v. United States*, 116 U.S. 616, 635 (1886).[3]

I must also respectfully dissent from the decision to affirm that portion of the district court's judgment that dismisses on the complaint the allegation of James Moore that his freedom of association was violated by the policy of the state to hire only those applicants who were determined to be politically acceptable. Patronage hiring admittedly presents a different situation from politically based firings and adverse personnel actions against state employees. However, as the majority appears to concede, the use of political criteria in the hiring process does implicate first amendment rights. Therefore, it must be determined whether the state's purpose in utilizing such politically based criteria serves a sufficiently important governmental interest to permit the curtailment of first amendment freedoms.

The fundamental flaw in the majority's approach is that it pays only lip service to the basic standard governing dismissals under Rule 12(b)(6):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

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[3] The majority also appears to invoke a rule of necessity to justify its course. It fears that the adoption of any rule other than the *Delong* test will transform the federal courts into a "supercivil service bureau" for all state and federal employees. Even if we assume that such concerns are relevant, we would be left with the fundamental reality that the protection of first amendment rights is indeed the proper work of the federal court. Our litigation process contains adequate steps to eliminate nonmeritorious cases.

set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In complex cases involving both fundamental rights and important questions of public policy, such peremptory treatment is rarely appropriate. *See Hobson v. Wilson*, 737 F.2d 1, 31 n.88 (D.C. Cir. 1984) (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1230 (1969 & Supp. 1984)), *cert. denied*, 470 U.S. 1084 (1985). In neither *Branti* nor *Elrod* did the Supreme Court attempt to deal with patronage practices on such a meager record. Nor did the Sixth Circuit attempt such a feat in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986). Significantly, *Avery* was decided on a motion for summary judgment rather than a 12(b)(6) motion to dismiss. Thus, the court had the benefit of greater detail as to how the patronage system actually operated:

> The political affiliation of a job applicant is taken into account in the hiring process in a round-about sort of way. As jobs become available, the official for the most part fills the vacancies informally on an *ad hoc* basis with friends, relatives, or acquaintances, or with the friends or relatives of political allies. Since plaintiff was unconnected with this network, her application was not considered.

Id. at 234.[4]

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[4] *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), was decided on the pleadings. *LaFalce* involved the claim of an unsuccessful bidder who challenged the city's use of political considerations in the awarding of public contracts. However, the court's task in *LaFalce* under the first amendment encompassed a far more simple and focused inquiry of competing interests than is true in this case. In *LaFalce*, the actual operation of the bidding system and its effects on individual contractors were fairly straightforward and well defined. The court itself acknowledged that the situation of contractors, presented in that case, and that of public employees, as is presented here,

(Footnote continued on following page)

As the majority points out, this case involves individual plaintiffs, not a class action. It also involves one particular political patronage system. However, we know very little, on the basis of the complaint alone, about the impact of this political patronage system on the first amendment rights of job applicants. We also know very little about the justification for this political patronage system. In my view, this case should be remanded to the district court. There, after adequate development of the record, the district court will be able to accomplish several tasks that are essential to a full and fair analysis of this case: 1) a thorough examination of the operation of *this* patronage system and the effect of that operation on the plaintiff; and 2) a thorough examination of the justifications for this particular system proffered by the defendants.

On the basis of the complaint, we do not even know the specific requirements imposed by this patronage system on the job applicant. We cannot determine, simply on the basis of the complaint, the degree to which the alleged patronage practices—or any combination of them—actually infringe on the first amendment rights of the plaintiff. It is not at all clear what a prospective employee must do to win the endorsement of the party representatives. There is a significant, and perhaps crucial, difference between a prospective government employee's having to be a registered Republican and having to do political work that involves endorsing publicly particular political positions that the applicant does not

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[4] *continued*

are not analogous because the relative strength of the competing interest in the two classes of plaintiffs differs significantly—so much so that the first amendment claim of the public contractor could be foreclosed on a motion to dismiss. Perhaps the court was justified in the public contracting context in treating the plaintiff's claim summarily. However, we should not extend such a summary treatment of first amendment rights to a case such as this one that squarely implicates the contours of Supreme Court precedent.

espouse or being required to pay the party in order to obtain favorable action on a job application.

Not only do we know very little about the actual operation of this particular patronage system and the resultant degree of infringement or the applicant's first amendment rights, we also know very little about the countervailing need of the state government for such a patronage system. Although the majority discusses at length the benefits of a strong patronage system, its evaluation of those benefits is not based on any knowledge of the *actual* operation of *this* system. Rather, its evaluation appears to be based on two sources totally external to this litigation: 1) the majority's own predilections; and 2) the majority's agreement with the conclusions of the dissenting justices of the Supreme Court of the United States in *Branti* and *Elrod*. Neither is an appropriate basis for decision by judges of an intermediate appellate court. It is perfectly proper and, indeed, unavoidable, for judges to *evaluate* the facts of a case in terms of their own experience. However, to perform that task, one must first know the facts of the case; at this stage of the proceedings, we simply do not have that information. To evaluate, on the basis of the pleadings alone, the need for such an extensive patronage system is pure *ipse dixit*. Similarly, the majority cannot dismiss this complaint on the basis of the dissenting opinions in *Elrod* and *Branti*. I respectfully submit that, as an intermediate appellate court, we ought not rely on a point of view that higher authority has rejected unless we can demonstrate that the *record* before us justifies such a deviation. Here, of course, we have no record other than the complaint. In short, adjudication of the issue of patronage hiring requires a far more focused inquiry than this court can possibly undertake at this stage of the proceedings.

In my view, the patronage hiring claim ought to be remanded to the district court for further development of the

record. That court can then render a considered judgment as to whether the rights of this plaintiff have been violated. On review, the judges of this court will be able to evaluate the judgment on the basis of the record—not on the basis of their own suppositions or predilections.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CYNTHIA RUTAN, et al.,
Plaintiffs,
vs.
THE REPUBLICAN PARTY OF ILLINOIS, et al.,
Defendants.

No. 85-3362

ORDER

INTRODUCTION

The defendants' motions to dismiss for failure to state a claim are pending before the court. Cynthia Rutan, Franklin Taylor, Dan O'Brian, Ricky Standefer, and James Moore filed this action on July 1, 1985, in their individual capacities and on behalf of six asserted plaintiff classes. These classes include: (1) all voters in the State of Illinois; (2) all taxpayers in the State of Illinois; (3) all employees of the State of Illinois who desire a promotion; (4) all employees of the State of Illinois who desire a transfer; (5) all employees of the State of Illinois who have been laid off but not rehired; and (6) all persons who desire employment with the State of Illinois.

The defendants include the Republican Party of Illinois, two Republican Party officials, Governor James R. Thompson, and seven former or current state government officials. The state officials, including Governor Thompson, are sued individually and in their official capacities. In addition, the defendant Greg Baise is sued as representative of a purported defendant class consisting of all "directors, heads or chief executive officers . . . since February 1, 1981, of departments, boards, and commissions under the jurisdic-

tion of the Governor of the State of Illinois." The defendant Lynn Quigley is likewise sued as a representative of a purported defendant class consisting of all "liaisons" between the Governor's Office of Personnel and the departments, boards, and commissions under the jurisdiction of the Governor since February 1, 1981.

ALLEGATIONS

The gravamen of the plaintiffs' complaint is that the defendants allegedly have conspired to create an employment system whereby decisions regarding the hiring, promotion, transfer, and rehire from lay off of the State's approximately 60,000 employees under the jurisdiction of the Governor are "substantially motivated by political considerations." The allegations which pertain to the experiences of the five named plaintiffs indicate that affiliation with the Republican Party is a key factor used in employment decisions made by the Governor's Office of Personnel.

Cynthia Rutan, an employee of the Department of Rehabilitative Services of the State of Illinois, alleges that she applied for a promotion to a section of the department called Adjudicative Services. The plaintiff Cynthia Rutan was not affiliated with the Republican Party at the time she sought promotion. She did not get the promotion. She alleges that the position was filled by someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel.

The plaintiff alleges she acquired a form distributed by the Republican Party Precinct Committeeman in her area which seems to be an application for promotion. The form is attached to the complaint as Exhibit B. The plaintiff does not allege that she was called upon to complete and to submit the form in connection with her application for promotion. This form seeks information regarding the applicant's vote in the primary elections. It also requests information about

the applicant's membership in the Lincoln Club of Sangamon County. Finally, it asks whether the applicant would be willing to become active in the Sangamon County Republican Foundation and to work in the precinct for candidates the Central Committee recommends as qualified for local, state, and national offices. The final line of the application requires a notation of approval or disapproval by the precinct committeeman.

The plaintiff Franklin Taylor currently works for the Illinois Department of Transportation. He applied for a promotion in July of 1983. A less qualified and less senior person got the promotion. This less senior person had received the support and approval of the Fulton County Republican Party. The plaintiff Taylor later requested a transfer to a different county. He was advised that the transfer could not be granted because the Republican Party for the counties he was transferring from and to had not approved of the request. The plaintiff Taylor is not an active supporter of the Republican Party.

Ricky Standefer was a temporary employee in 1984. In November of 1984 he and five other people were laid off. The five other people were offered other jobs. The plaintiff alleges they were offered other jobs because they had Republican Party support. The plaintiff Standefer had voted in the Democratic Party primary, presumably in 1984.

The plaintiff O'Brien was an employee of the State of Illinois and worked at the Lincoln Development Center of the Department of Mental Health and Developmental Disabilities. Plaintiff O'Brien was laid off in 1983. He was notified in 1984 that he was being recalled to work and that his recall depended upon an approval from the Governor's office in Springfield. In mid-1985 the plaintiff was told that the recall was not approved in Springfield. The plaintiff finally received a position with the State of Illinois, but only after he obtained the support of the Chairman of the

Republican Party of Logan County. The plaintiff has voted only once in a primary election and that was in a Democratic primary.

The plaintiff Moore was an applicant for a position with the State of Illinois. In August of 1980 the plaintiff Moore received a letter from his Republican State Representative. This letter is attached to the complaint as Exhibit C. The letter explains to the plaintiff that he should get the endorsement of the Republican County Chairman and the Precinct Committeeman to further his application. The plaintiff alleges that while he was attempting to get a position with the state, Victor English, the son of the current Chairman of the Polk County Republican Central Committee, Brian Burk, the son-in-law of the Vice-Chairman of the Precinct Committeewoman of the Polk County Republican Central Committee, and Dorris Thomas, plaintiff Moore's Republican Precinct Committeeman have all been hired by the state government in positions for which the plaintiff Moore was qualified.

DISCUSSION

I.

The plaintiffs contend that the defendants' use of political considerations in employment decisions offends their constitutional rights to free speech and association, due process and equal protection, and to a republican form of government. The strongest of the plaintiffs' claims is that the defendants' conduct violates their First Amendment rights to free speech and association. The plaintiffs rely on the Supreme Court decisions of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel* 445 U.S. 507 (1979), for the proposition that public employment cannot be conditioned on an employee's affiliation with a particular political party that is in power. The Supreme Court in both *Elrod* and *Branti* declared that the practice of firing employees who were hired by the administration that had been supplanted vio-

lated the First Amendment. The defendants respond that the *Elrod* and *Branti* decisions are limited to political firings; they do not apply to the use of political considerations in hiring, promoting, transferring and rehiring state employees. They argue that the use of political considerations in aspects of public employment other than punitive actions like discharge is constitutionally permissible. The court is persuaded that the defendants' position is correct and will dismiss the Section 1983 claims alleging violations of the First Amendment for the following reasons.

The Supreme Court explicitly limited its rulings in both *Elrod* and *Branti* to political firings. *Elrod v. Burns,* 427 U.S. 347, 353 (1976); *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980). Mindful of this, federal courts have rejected attempts to extend *Elrod* and *Branti* beyond firings or similar punitive personnel actions.[1] Two courts of appeal have recently considered the question of the use of patronage. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied 464 U.S. 1044 (1984) and *Avery v. Jennings,* 786 F.2d 233 (6th Cir. 1986). These courts refused to extend *Elrod* and *Branti* to prohibit the use of political factors in awarding contracts and in hiring public employees.

In *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984), the Seventh Circuit affirmed the district court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The court in

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[1] Some courts have extended *Elrod* where the adverse employment action is essentially punitive or amounts to a dismissal. See e.g., *DeLong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980) (punitive reassignment and transfer "tantamount to dismissal"). But cf. *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.) appeal dismissed 566 F.2d 846 (2nd Cir. 1977) (court refused dismissal because the plaintiffs alleged denial of promotions for failure to make a one percent of salary contribution to a political party). However, commentators have urged federal courts to extend *Elrod* and *Branti* to personnel actions other than discharge. See e.g., Hoffinger, First Amendment Limitations on Patronage Employment Practices, 49 U. Chi. L. Rev. 181 (1982).

LaFalce reasoned that *Elrod*'s per se prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." Id. at 293. In rejecting plaintiff's claim that unsuccessful contractors would similarly be discouraged from expressing their political beliefs, the court considered the extent to which patronage practices interfere with the expression of official views. Id. at 294. The court found the "extent of the likely interference" insufficient to raise constitutional concerns.

> If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent . . ., it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job.

Id. (emphasis added). Moreover, the court expressed grave doubts about the wisdom of a constitutional ruling forbidding the use of political considerations in this context.

> Against the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics.

Id.

The court, referring to the plaintiff's claim to protection under *Elrod*, concluded:

> We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*. . . .

Id. at 294-95.

The defendants also rely on *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), in which the Sixth Circuit addressed the question whether *Elrod* and *Branti* extend to political hiring decisions by elected officials. In *Avery* the plaintiff brought a class action suit alleging that her political beliefs had disqualified her from consideration for public employment. The district court granted summary judgment in favor of the defendants. On appeal, the Sixth Circuit affirmed, concluding that *Elrod* and *Branti* do not prohibit the practice of hiring applicants who are friends or are referred by political allies. 786 F.2d at 237.

The defendants' reliance on *Avery* is somewhat misplaced. Both the District Court and the Court of Appeals relied on evidence submitted by the parties to conclude that a First Amendment cause of action had not been established. This court must rule on a motion to dismiss relying solely on the allegations of the complaint. On a Federal Rule of Civil Procedure 12(b)(6) motion, all well-pleaded allegations of the complaint are deemed admitted, with every reasonable doubt resolved in favor of the pleader. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969), *Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984); *Burns v. Paddock*, 503 F.2d 18, 25 (7th Cir. 1974); *Williams v. Lane*, 548 F. Supp. 927, 929 n.2 (N.D. Ill. 1982). The complaint should not be dismissed unless it appears that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jenkins*, 395 U.S. at 422; *Hanrahan*, 747 F.2d at 1139. However, the principles articulated in *Avery* are helpful in interpreting the current state of the law on the use of political factors in hiring. The Sixth Circuit urges that federal courts not become

involved in a review of hiring decisions made by public employees.

> Although the informal hiring practice in question here places some burden on the associational rights of prospective job applicants, that burden does not rise to the level of constitutional deprivation. Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns. Compare *Keyishian v. Board of Regents,* 385 U.S. 586 (1967) (invalidating statute restricting employment of communists) with *Kovacs v. Cooper,* 336 U.S. 77 (1949) (upholding limits of use of sound trucks in political campaigns) and *Prince v. Massachusetts,* 321 U.S. 158 (1944) (upholding application of child labor laws to use of children for distribution of religious literature). See also L. Tribe, American Constitutional Law, 580-81 (1978). In the instant case the officials in question had no firm rule, regulation, or established policy foreclosing employment based on political affiliation, but their hiring system had the effect of giving weight to party affiliation.

There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod, Branti, Keyishian, Mitchell,* and *Wyman,* supra, and a patronage system that relies on family, friends, and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes--finding good employees, maintaining and

extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government.

Elrod and *Branti* did not affect normal patronage hiring systems in the United States because they were strict political affiliation discharge cases. Invalidation of informal hiring networks like those in the instant case because they lead to disproportionate representation of one political party or to a disproportionate number of liberals or conservatives would require abolition of the hiring systems for office workers and thousands of legislative, executive, and judicial offices across the country. In order to prevent patronage under the present systems, the courts would have to constitutionalize a civil service system and oversee its operation. There is no precedent for this reading of the First Amendment. Balancing the harm sought to be remedied--the tendency of the present systems to prefer particular political parties in different offices--against the legitimate needs of elected officials to hire in some manner effective employees who will not be blind to the public nature of the work and the political needs of their employer, we conclude that the hiring systems used by the defen-

dants did not abridge plaintiff's right of free speech under the First Amendment.

Avery v. Jennings, 786 F.2d at 236-37. A similar warning against federal court involvement in hiring decisions was articulated by Judge Campbell in *Illinois State Employees Union, Council 34 etc. v. Lewis,* 473 F.2d 561, 576 (7th Cir. 1972) (concurring).

The defendants rely as well on *Messer v. Curci,* 610 F. Supp. 179 (E.D. Ky. 1985), appeal pending, No. 85-5626 (6th Cir.) in which two seasonal workers challenged the decision of a city department not to rehire them. The court treated the plaintiffs' allegations as a hiring decision and concluded that *Elrod* did not support plaintiffs' claims for relief. The court noted that Supreme Court decisions have reflected a desire to "restrict the scope of First Amendment litigation of public employees." 610 F. Supp. at 184, citing *Connick v. Myers,* 461 U.S. 138 (1983).

The plaintiffs, however, allege more than a failure to hire. The allegations include instances in which political affiliation was taken into account in promoting, transferring, and rehiring laid off state employees. The court takes note of the plaintiffs' reliance on cases in which various employment practices were used to punish certain plaintiffs for the exercise of their First Amendment rights. Plaintiffs' Memorandum at 18, *McGill v. Board of Education,* 602 F.2d 774 (7th Cir. 1979); *Knapp v. Whittaker,* 757 F.2d 827 (7th Cir.), cert. denied 106 S. Ct. 36 (1985); *Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982); and *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970). These cases are inapposite for two reasons. First, they do not involve allegations that political patronage deprived plaintiffs of their First Amendment rights. Second, unlike the case at bar, the plaintiffs-employees in the foregoing cases suffered punitive personnel actions in retaliation for their exercise of protected First Amendment speech. Similarly, both *Dendor v. Board of Fire and Police Commissioners,* 11

Ill. App.3d 582 (1st Dist. 1973) and *Hasentab v. Board of Fire and Police Commissioners,* 71 Ill. App.3d 244 (5th Dist. 1979) involved allegations of direct retaliation for the exercise of employees First Amendment rights.

The plaintiffs' allegations are too vague and inconclusive to support a scenario of punitive actions based solely upon political belief. Cynthia Rutan does not allege that her failure to be promoted was directly related to her own political activity. Cf. *Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982) (reversing dismissal of a complaint because of allegations that plaintiff was being retaliated against for her political speech) and *Blameuser v. Andrews,* 630 F.2d 538 (7th Cir. 1980) (applicant for ROTC promotion stated claim because denial linked to his Nazi writings). Franklin Taylor alleges that his request for a transfer had to be approved by the Republican Party Chairman. He does not allege that he was being punished for speaking out on an issue of public concern. Cf. *McGill v. Board of Education,* 602 F.2d 774 (7th Cir. 1979) (teacher stated claim based upon transferd after she voiced complaints and "stirred up trouble"). Ricky Standefer suggests that others were given jobs because they had Republican Party support. He does not allege that he was laid off because he had taken a political position. Dan O'-Brien claims that others who were less qualified than he were given jobs and he suggests it was because of their political connections. Again, there is no direct allegation of retaliation or punishment due to an expression of political belief. Finally James Moore alleges that his employment prospects were explicitly conditioned on political sponsorship. He then alleges that others who were politically connected were hired for positions that Moore was qualified to fill, but not necessarily positions for which he had applied. There is no allegation that the plaintiff James Moore was being retaliated against or punished for maintaining a certain stand or political position.

The plaintiffs argue that their allegations should withstand dismissal because the complaint is essentially a duplicate of that which was presented in the successful challenge to patronage practices in Cook County, Illinois. *Shakman v. Democratic Organization of Cook County,* 481 F. Supp. 1315 (N.D. Ill. 1979), appeal pending, *Shakman v. Dunne,* Nos. 85-1870, 85-1911, 85-1912 (7th Cir.). However, the *Shakman* case is quite different from the plaintiffs'. Judge Bua explicitly declined the invitation to rule on the constitutional rights of applicants for state employment. Standing to proceed was granted only to candidates and voters in Cook County, Illinois. 481 F. Supp. at 1327. To the extent that Judge Bua reads *Elrod* as extending to hiring decisions, the court disagrees because that interpretation is at odds with the more recent rulings in *LaFalce, Avery,* and *Messer*. See *Shakman,* 481 F. Supp. at 1327-28 n.9 (where court took position that the Supreme Court intended that *Elrod* extend to hiring decisions).

The plaintiffs also assert their First Amendment claims as taxpayers and as voters. They incorrectly cite to *Shakman* as support of their claims as taxpayers. Judge Bua found no taxpayer standing, noting that taxpayers may challenge only those expenditures that operate to restrict the exercise of the taxing and spending power. Id. at 1322 n.l. See *United States v. Richardson,* 418 U.S. 166, 173 (1974) and *Flast v. Cohen,* 392 U.S. 83, 106 (1968). The plaintiffs fail to make such a claim.

Judge Bua did find that *Shakman* had standing as a candidate for office and as a voter. 481 F. Supp. at 1322. He explicitly rested his ruling on a finding that the challenged patronage employment doctrines directly burdened constitutionally protected interests of candidates for political office. Id. The plaintiffs, however, allege no more than the observation that the employment practices "create a significant political effort" in favor of the defendant Thompson and his political allies. They fail to present any allegations or

even argument suggesting that the employment practices affect election outcomes. Without a more direct link to the defendants' conduct, any injury plaintiffs suffer as voters is illusory. Standing as voters requires more. See *Winpsinger v. Watson,* 628 F.2d 133,137 (D.C. Cir. 1980) (Kennedy supporters had no standing to challenge Carter's patronage hiring). The plaintiffs' conclusions fail to state a claim for a violation of the First Amendment rights of voters in the State of Illinois.

The plaintiffs' nonetheless urge this court to allow the case to proceed until the defendants can offer a compelling reason for use of political considerations in hiring. That balancing test, the plaintiffs argue, is required by a line of First Amendment decisions beginning with *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and applied in *Elrod,* 427 U.S. at 363. The *Keyishian* decision and other cases relied upon by the plaintiffs provide no guidance on the issues in this case. The general principles of First Amendment jurisprudence, and many of the cases cited by the plaintiffs, were distinguished by the Sixth Circuit in *Avery*:

> Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech, than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns.

786 F.2d at 236. Here, as in *Avery*, any incidental effect that might flow from the use of political considerations in employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech. Furthermore, the principal cases relied upon by the plaintiffs involve the dismissal of a public employee for the exercise of his constitutionally protected speech. See *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). In the instant case, there is no

allegation that the plaintiffs were discharged or threatened with discharge.

II.

The plaintiffs have also conceded in their memoranda and in oral argument that certain allegations of rights violations in their complaint do not state a claim. First of all, the plaintiffs concede that, under *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985), their complaint is insufficient. The plaintiffs cannot recover under Section 1985(3) for damages caused by a political but wholly non-racial conspiracy among private parties. See Plaintiffs' Memorandum at 38. Secondly, the plaintiffs concede that their allegation that the Guarantee Clause, Article IV, Section 4 of the United States Constitution, has been violated by the defendants' actions is also without basis. Ever since the decision in *Luther v. Warden*, 48 U.S. (7 How.) 1 (1849), the Supreme Court has repeatedly held that whether the Guarantee Clause has been violated is not a judicial, but a political question. Enforcement of this clause is for Congress and not for the courts. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917). The Supreme Court has refused to resort to the Guarantee Clause as a source of a constitutional standard for invalidating state action. *Baker v. Carr*, 369 U.S. 186, 223 (1962). It is clear that the plaintiffs' allegations fail to state a cause of action regarding a violation of this right.

Also, the court is persuaded that the plaintiffs fail to allege properly a cause of action under the Due Process Clause of the Fourteenth Amendment. The plaintiffs claim that the use of political considerations in employment decisions violates their right to due process under the Fourteenth Amendment. To determine whether the due process requirements of the Fourteenth Amendment apply in the first place, the court must look to the nature of the interests at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570-71

(1972). The plaintiffs must establish that the interests they assert are within the ambit of the Fourteenth Amendment's protection of property. Id. The plaintiffs attempt to satisfy this prerequisite by claiming that the Illinois Personnel Code, Ill. Rev. Stat. ch. 127, § 63(b)(101) (1985) et seq. vests in them "certain property interests" which the employment process allegedly disregards. However, it has been long settled in Illinois that, at least in situations other than discharge, a public employee has no property right in public employment which falls within the protection of the Due Process Clause of either the state or federal constitution. *Levin v. Civil Service Commission*, 52 Ill.2d 516, 521 (1972).

The plaintiffs' allegation that the Equal Protection Clause of the Fourteenth Amendment has been violated by the defendants' actions also fails to state a claim. The plaintiffs seem to contend that the alleged employment system permits state officials to obtain political support for Republicans statewide, while Democratic office holders in Cook County are restrained from doing so by court order, including a 1972 consent decree, in *Shakman v. Democratic Organization of cook County*, No. 69C2145 (N.D. Ill.) appeal pending, *Shakman v. Dunne*, Nos. 85-1870, 85-1911, 85-1912 (7th Cir.). There is no standing for plaintiffs' challenge. The plaintiffs never state how restrictions on state officials in Cook County cause damage to the plaintiffs as voters, employees, or applicants in areas outside of Cook County. This failure flaws their claim. The fact that public officials in the Northern District of Illinois have entered into a consent decree which limits their discretion as public employers does not give rise to an equal protection claim merely because public officials in other parts of the state are not similarly restrained. The Equal Protection Clause of the Fourteenth Amendment protects individuals from state actions which purposefully discriminate against those who are entitled to be treated similarly. *McCalvin v. Fairman*, 603 F. Supp. 342 (C.D. Ill. 1985). Any disparate treatment which stems from orders

entered by a court disadvantages those parties who are restrained by the court order, not those left unaffected.

The plaintiffs allege in their memoranda but not in their complaint that friends of the state administration are treated differently that strangers in employment matters. If this argument is an attempt to bring the plaintiffs under the umbrella of the *Shakman* ruling, it fails. Such allegations do not show that the employers have singled out a particular group for disparate treatment and selected a course of action for the purpose of causing adverse political effects on an identifiable group.

Finally, the plaintiffs also concede that all but one of their claims under state law are barred by the Supreme Court decision in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). In *Pennhurst*, the Supreme Court held that the Eleventh Amendment bars a suit by a citizen against a state without a state's consent or Congressional abrogation of the state's immunity. "The state is the real, substantial party in interest" regardless of whether the suit seeks damages or injunctive relief. Applying that rule to the case at bar, there can be no doubt that the plaintiffs' suit is one against the State of Illinois. The plaintiffs have sued the state officials, including the Governor, in their official capacities. Moreover, the plaintiffs purport to sue two additional defendant classes, including the heads of all state departments, boards, and commissions under the jurisdiction of the Governor. The damage request if granted would be borne by the State under Ill. Rev. Stat. ch. 127, § 1302 (1983), and thus, clearly "would expend itself on the public treasury". *Pennhurst,* 465 U.S. at 101. Certainly the plaintiffs' request that a receivership be instituted to control and operate the hiring and promotion system of the State's fifty departments, boards, and commissions under jurisdiction of the Governor invades the province of the State.

The plaintiffs' argue that their state law claim seeking the restoration of funds expended to operate the Governor's office of personnel is not barred by the Eleventh Amendment because the plaintiffs are purportedly acting on behalf of the state. See Plaintiffs' Memorandum at 37. This court will not even address that argument because it is confident that all state claims must be dismissed if there no longer is a basis for federal jurisdiction. Since the court is constrained to dismiss all of the federal causes of action presented by the plaintiff, this remaining state claim must be dismissed as well. See *United Mineworkers v. Gibbs,* 383 U.S. 715, 726 (1966).

IT IS THEREFORE ORDERED that the defendants' motions to dismiss the plaintiffs' complaint is granted. The plaintiffs' complaint is dismissed with prejudice. The Clerk shall enter judgment accordingly.

ENTER this 11th day of July, 1986.

HAROLD A. BAKER
Chief U.S. District Judge

(2)

No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits elected officials from hiring public employees, substantially, but not wholly, based on broadly defined "political considerations."

2. Whether the First Amendment prohibits elected officials from promoting or granting desired transfers to public employees substantially, but not wholly, based on broadly defined "political considerations."

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

STATE RESPONDENTS' BRIEF IN OPPOSITION

Respondents, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY and JAMES R. THOMPSON (collectively the "State Respondents"), respectfully request that this Court deny the petition for a writ of certiorari ("the Petition") seeking review of the Seventh Circuit's *en banc* opinion in this case.[1] The opinion of the Seventh Circuit

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[1] The Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith are also respondents in this proceeding. Counsel for these respondents have indicated that they intend to adopt the State Respondents' Brief In Opposition to the Petition.

is officially reported at 868 F.2d 943 (7th Cir. 1989) (en banc).[2]

JURISDICTION

The jurisdictional statement contained in the Petition includes substantial legal argument and is thus improper under Supreme Court Rule 21.1(e). This Court has jurisdiction to review the final judgment of the Seventh Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Complaint

On July 1, 1985 plaintiffs Cynthia Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James Moore ("Plaintiffs") filed this action against Governor James R. Thompson and seven former or current state government officials, the Republican Party of Illinois and of each county of Illinois, and two Republican Party officials (collectively, "Respondents"). Plaintiffs allege that Respondents have maintained an employment system in which certain personnel decisions are "substantially motivated by political considerations." (R.A. 7, ¶ 11f.)[3] The "political consid-

[2] The opinion of the Seventh Circuit, on rehearing *en banc*, is appended to the Petition at A-1, and will also be cited herein ("A-[page number]").

[3] Although Petitioners purport to describe the allegations in the complaint throughout the Petition and even reproduce a section of the appendix to the complaint (Petition, at 8-9), they do not

(Footnote continued on following page)

erations" which Respondents allegedly take into account in the employment process are numerous and varied, and include the following (R.A. 7, ¶ 11f):

> ". . . whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson."

As a result of these broadly defined "political considerations," Plaintiffs claim that they have been denied certain jobs, promotions and transfers because they are not "politically acceptable or approved by Defendants" (*e.g.*, R.A. 4, ¶ 7a), and that "political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment." (R.A. 2, ¶ 1.) Petitioner Moore alleges that he has unsuccessfully sought employment with the State since 1978 (R.A. 17, ¶ 23b), while three individuals allegedly affiliated with the Republican Party "have all been hired by State government in positions for which [he] was qualified." (R.A. 17, ¶ 23e.) Petitioner Moore does not allege that the candidates who were hired were unqualified for the state jobs, or that he was more qualified than these other candidates.

Petitioner Rutan alleges that since the fall of 1981 she has applied for promotions to supervisory positions within

[3] *continued*
provide supporting citations to the complaint or include a copy of the complaint in the Appendix. Because the Petition frequently exaggerates the allegations in the complaint, Respondents provide a copy of the complaint in Respondents' Appendix ("R.A.") at R.A. 1-26.

her department (R.A. 14, ¶ 19b), but that each position she sought allegedly was given to "someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel." (R.A. 14, ¶ 19g.) Petitioner Taylor also claims that he failed to obtain a promotion, which allegedly was awarded to another state employee "who was less qualified and had less seniority" but who had the support and approval of the Republican Party. (R.A. 15, ¶ 20c.) Petitioner Taylor claims that he has not received a desired transfer to another county, ostensibly on political grounds. (R.A. 15, ¶ 20f, g.)[4]

None of the Plaintiffs allege that they have been discharged, demoted, harassed or punished in any manner because of their political beliefs or affiliation. Nor do Plaintiffs allege that the individuals who received the particular jobs, promotions, or transfers which they themselves desired are unqualified under the Illinois Personnel Code. *Ill. Rev. Stat.* ch. 127, ¶ 63b101, *et seq.* (1985).

Plaintiffs allege that the employment system described in the complaint violates a number of federal and state

[4] Two of the Plaintiffs have not joined the petition for a writ of certiorari. (Petition, at ii n.2.) Plaintiff Standefer alleges that in November 1984 he was laid off from his temporary state position "along with five other employees." (R.A. 15, ¶ 21b.) Standefer does not challenge the layoff itself, but complains that the other employees who were laid off were offered other jobs in state government, while he was not. (R.A. 15, ¶ 21c.) Plaintiff O'Brien alleges that he was informed in December 1984 that he would be recalled from layoff. (R.A. 16, ¶ 22b, d.) However, he claims that he did not gain state employment until he obtained the support of the Republican Party. (R.A. 16, ¶ 22e, g.)

The Seventh Circuit plainly did not hold, as Petitioners suggest (Petition, ii n.2), that the claims of Standefer and O'Brien fall within this Court's ruling in *Elrod v. Burns*, 427 U.S. 347 (1976). *See Rutan*, 868 F.2d at 956; (A-27). The court remanded their claims to the district court to determine whether their failure to be rehired "was the substantial equivalent of a termination from employment." *Id.* at 956, 957, (A-27-28).

constitutional rights, including the rights of freedom of speech and association (R.A. 17, 18, 19, ¶ 24a, g, h), due process (¶ 24c, f), equal protection (¶ 24b, d, f), and a republican form of government (¶ 24e). Plaintiffs seek $1.002 billion in actual and punitive damages, and the imposition of a receivership "to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor." (R.A. 22, ¶ 12.)

B. Proceedings in the District Court

On May 23, 1986, after full briefing and argument, the district court dismissed the complaint in its entirety. (R. 73; R. 77, at 33-35.) On July 11, 1986, the district court issued a twenty-page order setting forth the basis for its judgment dismissing the complaint. *See Rutan v. Republican Party of Illinois*, 641 F. Supp. 249 (C.D. Ill. 1986).[5] The district court held that Plaintiffs failed to state a claim under the First Amendment because the alleged use of political considerations in hiring, promoting, transferring and rehiring state employees does not fall within this Court's limited holding in *Elrod v. Burns*, 427 U.S. 347 (1976), prohibiting the dismissal of public employees based solely on political belief. *Rutan v. Republican Party of Illinois*, 641 F. Supp. at 253; (C-5).

The district court determined that *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), were inapplicable because "any incidental effect that might flow from the use of political considerations in [the challenged] employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech." 641

[5] A copy of the district court's decision is appended to the Petition at C-1, and also will be cited herein ("C-[page number]").

F. Supp. at 257; (C-13). Moreover, the court found that Plaintiffs' allegations do not "support a scenario of punitive actions based solely upon political belief." 641 F. Supp. at 255; (C-11). The district court emphasized that Petitioner Rutan has not alleged "that her failure to be promoted was directly related to her own political activity." *Id.* Likewise, there are no allegations that Petitioner Taylor "was being punished for speaking out on an issue of public concern," or that Petitioner Moore "was being retaliated against or punished for maintaining a certain stand or political position." *Id.* at 256; (C-11). According to the district court, Petitioners' allegations that other candidates received the jobs, promotions or transfers which they themselves desired did not constitute "punitive personnel actions in retaliation for their exercise of protected First Amendment speech." *Id.* at 255; (C-10).

C. Proceedings in the Seventh Circuit

In their subsequent appeal to the Seventh Circuit, Petitioners abandoned all but two of their claims: (1) their claim as applicants and employees that the alleged patronage system violated the First Amendment; and (2) their claim as voters that the alleged patronage system violated the Fourteenth Amendment by denying them equal access and effectiveness in elections. *See Rutan v. Republican Party of Illinois*, 848 F.2d 1396, 1399-1400 (7th Cir. 1988); (B-6-7).[6] By a 2-1 vote, a panel of the Seventh Circuit affirmed the district court's judgment that Petitioner Moore's allegations of "political hiring" did not state a constitutional claim. *Rutan v. Republican Party of Illinois*, 848 F.2d at 1408; (B-23). The panel remanded the claims of the plaintiffs/employees for a determination

[6] A copy of the panel opinion is appended to the Petition at B-1, and also will be cited herein ("B-[page number]").

whether the alleged employment actions complained of were "the substantial equivalent of dismissal." *Id.*[7]

After a rehearing *en banc*, the Seventh Circuit reinstated the panel majority's opinion virtually unchanged. *Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1989) (en banc); (A-1). Following its prior decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and the decision of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the court ruled that the First Amendment does not prohibit elected officials from considering broadly defined political factors in hiring public employees. *Rutan*, 868 F.2d at 954-55; (A-24). In holding that Petitioner Moore failed to state a constitutional claim, the Seventh Circuit determined that the burdens which the alleged employment practices imposed on the First Amendment rights of job applicants did not rise to the level of a constitutional deprivation. *Id.* at 955; (A-24). The court reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Id.* at 954; (A-24). Furthermore, "[a]ny burden imposed on an employment applicant does not out-

[7] The panel affirmed, without dissent, the district court's dismissal on standing grounds of Plaintiffs' allegations, as voters, that the alleged employment system deprived them of "equal access and effectiveness of elections." 848 F.2d at 1411; (B-29). Following its prior decision in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988), and the District of Columbia Circuit decision in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the Seventh Circuit concluded that "the injury asserted in the complaint is not fairly traceable to the challenged action." *Rutan*, 848 F.2d at 1412; (B-31). The *en banc* decision unanimously adopted this holding. *Rutan*, 868 F.2d at 958; (A-32).

Petitioners do not seek review of the Seventh Circuit's decision on this issue, and it is manifest that the Seventh Circuit's ruling on Petitioners' claims as voters is fully consistent both with this Court's precedents on standing and with decisions of other courts of appeal.

weigh the significant intrusion into state government required to remedy such a claim." *Id.* at 955; (A-24).

The court recognized that, with regard to existing employees, an open question remains "over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment." *Id.* at 949; (A-13). To resolve the constitutionality of the promotion, transfer and rehiring claims alleged in the complaint, the panel adopted the "substantial equivalent of dismissal" test enunciated in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). *Rutan*, 868 F.2d at 951; (A-17).

The *en banc* court cited three principal reasons for adopting the *Delong* standard. *Rutan*, 868 F.2d at 952; (A-17-18). First, the *Delong* analysis properly takes into account this Court's limited holding in *Elrod* and recognizes that there is serious question as to the wisdom of further extending the reach of that decision. *Id.*; (A-17). Second, *Delong* recognized the substantial differences that exist between dismissals, which can disrupt settled expectations, and other employment practices. *Id.*; (A-17). Third, application of the *Delong* standard avoids the substantial intrusion of federal courts into the every day operations of state and local governments, while at the same time providing a remedy for an employee who can demonstrate that his or her failure to obtain a desired promotion, transfer or rehire imposes the same kind of burden as would the employee's outright termination. *Id.*; (A-17-18).

Although the court adopted the *Delong* analysis, it emphasized that the allegations in this case are substantially different from claims of political retaliation like those at issue in *Delong*. This case does not involve adverse employment actions taken to punish employees for the exercise of free speech. Here, Plaintiffs complain only that other employees were "favored" by their public employer.

(R.A. 2. ¶ 1.) Thus, the Seventh Circuit explained—as had the district court in *Rutan* and the Sixth Circuit in *Avery*—that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4).

Only one judge dissented as to the dismissal of Petitioner Moore's hiring claim. *Id.* at 959; (A-33). Only two judges dissented from the majority's adoption of the "substantial equivalent of dismissal" standard to govern the remaining claims of the Plaintiffs, including Petitioners Rutan and Taylor. *Id.* at 958-59; (A-33).

REASONS FOR DENYING THE WRIT

Petitioners claim that this case presents five separate questions for the Court to decide. (Petition, i.) Apparently, Petitioners believe that the likelihood of securing Supreme Court review is enhanced by asking the same questions several different ways. In fact, there are only two issues raised by the Petition. First, whether Petitioner Moore has alleged a cognizable claim under the First Amendment because he was not hired by the state, based in part on broadly defined "political considerations" which include the use of recommendations by friends or relatives of Republicans. Second, whether Petitioners Rutan and Taylor have stated a constitutional claim because they allegedly failed to obtain favorable treatment from their state employer, based in part on those same amorphous considerations.

Both the district court and the Seventh Circuit, sitting *en banc*, emphasized the significant difference between

Petitioners' allegations that certain favorable employment decisions are "substantially motivated" by a myriad of broadly defined "political considerations" (R.A. 7, ¶ 11f), and the imposition of punitive employment actions in direct retaliation for political belief or expression. *See Rutan*, 868 F.2d at 954 n.4; (A-23 n.4); 641 F. Supp. at 255, 257; (C-10-11, 13). In requesting Supreme Court review, Petitioners fail to recognize the different burdens imposed on the constitutional rights of the affected applicants and employees in the two distinct classes of cases. When the Seventh Circuit's decision is viewed in light of the allegations in the complaint, it becomes clear that review by this Court is unwarranted.

In Part I of this brief we show that the Seventh Circuit correctly applied the controlling precedents of this Court by considering, as a threshold matter, whether the alleged employment practices sufficiently implicate First Amendment rights to require additional constitutional scrutiny. The Seventh Circuit's holding that *Elrod* should be limited to practices that are determined to be "the substantial equivalent of dismissal" is faithful to both the letter and the spirit of that decision.

In Part II, we demonstrate that there is no conflict among the courts of appeal warranting a writ of certiorari. In Part II.A, we demonstrate that the analysis and judgment of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986)—the only other appellate decision to squarely confront the use of political considerations in the hiring process—is entirely consistent with the decision below. In Part II.B, we show that the Seventh Circuit's holding that the failure to obtain a desired promotion or transfer states a claim if it is tantamount to dismissal does not conflict with the decisions of any other court of appeal. Petitioners' attempt to manufacture such a conflict cannot be sustained in light

of the different facts alleged and legal claims asserted in the cases upon which they rely.[8]

I.

THE SEVENTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

In *Elrod v. Burns*, 427 U.S. 347 (1976), a closely-divided Court held that a non-policymaking government employee may not be discharged or threatened with discharge solely because of his political beliefs. Writing for the three-Justice plurality, Justice Brennan recognized that "[a]lthough political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S. at 353 (Brennan, J., plurality opinion).[9] The *Elrod* Court found that patronage practice runs afoul of the First Amendment only "to the extent it compels or restrains belief and association." *Id.* at 357. The Court reasoned that the dismissal or threat of dismissal from existing employment "unquestionably inhibits protected

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[8] In fact, for the reasons stated in the conditional Cross-Petition filed by the State Respondents, the Seventh Circuit should have affirmed the dismissal of Petitioners Rutan's and Taylor's claims that they did not receive favorable treatment from their public employer. *See* Cross-Petition For Writ of Certiorari To the Seventh Circuit Court of Appeals, *Frech v. Rutan*, No. 88-____, at 5-12.

[9] Justice Stewart's concurring opinion, joined by Justice Blackmun, confirmed the limited reach of *Elrod* (427 U.S. at 375) (Stewart, J., concurring): "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court reiterated that the only practice at issue in *Elrod* was the firing of public employees for partisan reasons. *Id.* at 513 n.7.

belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359. Only then did the Court consider whether there was adequate justification for this "unquestionable" effect; finding none, the Court held the practice of patronage dismissals unconstitutional. *Id.* at 373.

This is precisely the analysis applied by the Seventh Circuit in this case, both with respect to Petitioner Moore's claim as a job applicant and the claims of Petitioners Rutan and Taylor as existing employees. In the case of applicants for state employment, the Seventh Circuit first questioned whether the hiring practices alleged by Petitioner Moore sufficiently implicated First Amendment rights, before considering whether further constitutional analysis was required. The Seventh Circuit correctly held that any conceivable burden imposed by a failure to obtain a particular position "is much less significant than losing a job," (868 F.2d at 952; (A-18)), and is insufficient to raise a First Amendment question requiring constitutional analysis. After finding that the use of political considerations, as broadly defined in the complaint, fails to have the "unquestionable" effect that existed in *Elrod*, the Seventh Circuit correctly affirmed the dismissal of the hiring claim without proceeding to the next stage of the constitutional analysis.

Similarly, with respect to the claims of Petitioners Rutan and Taylor, the Seventh Circuit correctly held that a non-punitive denial of a desired transfer or promotion could not have the "unquestionable" effect on First Amendment rights underlying *Elrod* unless the denials were the "substantial equivalent of a dismissal." 868 F.2d at 955; (A-25). Only upon such a showing could a court proceed to the next step in the constitutional analysis and determine whether there is sufficient justification for the practice.[10]

Petitioners' suggestion that the Seventh Circuit improperly departed from "the analysis required by long established First Amendment jurisprudence" (Petition, at 20), is plainly incorrect. Petitioners' reliance on *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), is misplaced because, as a preliminary matter, those cases involved the dismissal or threat of dismissal of public employees for the exercise of constitutionally protected speech. In the instant case, there is no allegation that any state employee has been discharged or threatened with discharge.

More importantly, both courts below properly determined that the general principles of First Amendment jurisprudence established by *Pickering* and *Keyishian* do not control the issues raised by the allegations in Petitioners' complaint. *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4); 641 F.

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[10] Recent decisions of this Court, although in the context of affirmative action plans, underscore the correctness of the Seventh Circuit's analysis that dismissals from employment have a far greater impact on individuals than do other types of employment decisions. *E.g.*, *Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S. Ct. 1442, 1455 (1987) (in upholding an affirmative action plan, the Court observed that "denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner"); *United States v. Paradise*, ___ U.S. ___, 107 S. Ct. 1053, 1073 (1987) (in upholding strict racial quotas on the hiring and promotion of Alabama state troopers, the Court distinguished the burdens imposed on individuals who fail to obtain jobs or promotions from the burdens endured by employees laid off or discharged); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282 (1986) (in striking down a school board policy giving minority teachers preferential protection from layoff, the plurality noted that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job").

Supp. at 257; (C-13). As the Sixth Circuit explained in *Avery v. Jennings*, 786 F.2d at 236: "Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns." *See also Pieczynski v. Duffy*, 88-2381, Slip Op. at 4 (7th Cir., May 30, 1989) (R.A. 30) ("It is one thing to be a target of a campaign of retaliation, [it is] another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees"). (A copy of the Seventh Circuit's opinion in *Pieczynski* is appended hereto at R.A. 27-36.)

In short, the Seventh Circuit properly concluded that under the *Elrod* analysis, Petitioners' allegations that they were denied employment or favorable treatment by their public employer fail to state a cognizable constitutional claim. The alleged "patronage system" which Petitioners attack falls far short of intending or achieving the unquestionable effect underlying *Elrod*. Petitioners have not alleged that Respondents employ a "strict political test . . . designed to call attention to political differences and punish those who differ." *Avery*, 786 F.2d at 237. Instead, Petitioners claim only that certain personnel decisions are "substantially motivated" by a variety of "political considerations," some of which are wholly unrelated to political belief (*e.g.*, "a relative or friend of a Republican"). (R.A. 7, ¶ 11f.)

Neither *Elrod* nor its progeny justify extension of the ban on patronage dismissals to the very different situations alleged in the complaint. The Seventh Circuit analyzed each of Petitioners' claims by reference to the burdens allegedly imposed on their First Amendment rights. Such an approach is entirely consistent with the precedents of this Court and thus does not warrant review.

II.

THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL ON THE SPECIFIC ISSUES RAISED BY PETITIONERS IN THIS CASE.

In apparent recognition that the Seventh Circuit's decision comports fully with the controlling authorities of this Court, Petitioners principally argue that the decision "is in direct conflict with the decisions of other circuit courts of appeal." (Petition, at 12.) However, as we demonstrate in Section A, below, there is no conflict whatsoever on the issue of political hiring. The only other court of appeal to address this question has determined, on the basis of a system far more partisan than the system alleged in the complaint, that elected officials may take political considerations into account in making subjective hiring decisions. *Avery v. Jennings*, 786 F.2d at 234.

In addition, the claim of Petitioners Rutan and Taylor (Petition, at 12) that "the Seventh Circuit's holding on promotion and transfer conflicts sharply with the majority of the Courts of Appeal" is simply incorrect. It rests, at bottom, on a mischaracterization of both the allegations in the complaint and the Seventh Circuit's holding. We demonstrate in Section B that the issues concerning nonpunitive denials of promotion and transfer which the Seventh Circuit decided are significantly different from the claims of political retaliation in *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), and *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). While the Seventh Circuit adopted *Delong*'s "substantial equivalent of dismissal" test as the appropriate standard by which to measure the unique allegations before it, *Delong* and other decisions involving claims of political retribution are not controlling and cannot provide the basis for Supreme Court review.

A. The Only Other Court Of Appeal To Decide The Issue Has Held That Elected Officials May Consider Political Factors In Making Subjective Hiring Decisions.

In holding that Petitioner Moore failed to state a constitutional claim, the Seventh Circuit noted that the burden imposed by a failure to obtain a particular position "is much less significant than losing a job." *Rutan*, 868 F.2d at 952; (A-18). The Seventh Circuit explained (*id.*; A-19):

> "[A]n applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income."

Against the limited burdens imposed on disappointed applicants, like Petitioner Moore, who are not hired by a state agency or department, the Seventh Circuit weighed the "great reluctance" of this Court to have federal courts "preside as a platonic guardian over state employment systems." *Id.* at 954; (A-22). *See Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter"); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("Federal court is not the appropriate forum in which to review the multitude of personnel decisions made daily by public agencies").[11]

[11] The Seventh Circuit's decision on political hiring is consistent with and derives from its prior opinion in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

(Footnote continued on following page)

The Seventh Circuit's holding that elected officials may consider political factors in hiring public employees is entirely consistent with *Avery v. Jennings*, 604 F. Supp. 1356 (S.D. Ohio 1985), *aff'd*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the only other appellate decision on this question. In *Avery*, the plaintiff alleged that defendants had disqualified her from consideration for public employment because of her political beliefs. Noting that no court had ever recognized the cause of action asserted, the district court granted summary judgment on the ground that plaintiff had failed to establish any infringement of her First Amendment rights.

On appeal, the Sixth Circuit affirmed, holding that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. The court acknowledged that the hiring system in question operated, by design, "to prefer Republicans." *Id.* at 235. During a period of nearly eight years, only 10 of the 432 persons hired by the defendants were Democrats. One of the defendants in *Avery* explained the preference in plainly

[11] *continued*

In *LaFalce*, the Seventh Circuit affirmed the district court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The *LaFalce* court reasoned that *Elrod*'s prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." *Id.* at 293.

In rejecting the plaintiff's claim that unsuccessful contractors would similarly be discouraged, the court considered "both the extent of the likely interference and the consequences of trying to prevent it through an interpretation of the Constitution." *Id.* at 294. As it did in this case, the Seventh Circuit in *LaFalce* found the "extent of the likely interference" with First Amendment rights insufficient to raise constitutional concerns, and the wisdom of a constitutional ruling forbidding the use of political considerations in this context dubious at best. *Id.*

partisan terms: " '[A]ll things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected.' " *Id.*

In *Avery*, the court of appeals found that "[a]lthough the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation." *Id.* at 236. As the court reasoned (*id.* at 237):

> "There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes—finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government."[12]

[12] In *Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985), *appeal pending en banc*, No. 85-5626 (6th Cir.), the district court reached a similar result. Two seasonal workers alleged that the Kentucky Department of Parks refused to rehire them solely because of their political affiliation. The court, treating that decision as a failure to hire, found that *Elrod* and its progeny failed to support the plaintiffs' claims. 610 F. Supp. at 183.

Contrary to the implication in the questions Petitioners have presented to this Court (Petition, i), there is no allegation in this case that Respondents' employment decisions are based solely on political affiliation. *See Rutan*, 641 F. Supp. at 255; (C-11). Nor have Petitioners alleged that recommendations are made exclusively by Republican Party officials or party members, or that Petitioners' failure to obtain recommendations excluded them from consideration for the positions they sought. Petitioners claim only that Respondents are "substantially motivated by political considerations" which include an informal network of recommendations from a variety of sources. (R.A. 7, ¶ 11f.) These allegations, even if true, portray an employment system far less preclusive than the practice upheld in *Avery*. Thus, the Seventh Circuit's refusal to extend *Elrod* to encompass such a claim is entirely consistent with the other appellate authority on this issue.

In an effort to create the appearance of a conflict, Petitioner Moore cites a series of cases in which public employees were punished in retaliation for the exercise of protected speech. (Petition, at 16-19.) These cases did not involve, much less resolve, the claim of political hiring alleged in the complaint.

In *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (per curiam), for example, an employee of a regional mental health board alleged that his supervisor was providing prospective employers with negative recommendations because the plaintiff had cooperated with the state attorney general's investigation into allegations of fraud. The court in *Marohnic* did not discuss or even cite this Court's decision in *Elrod*, or the Sixth Circuit's prior decision in *Avery*. This confirms that *Marohnic* addressed far different issues than did *Elrod*, *Avery* or *Rutan*, and

not—as Petitioners erroneously assert (Petition, at 16)—that *Avery* is in direct conflict with *Marohnic*.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff claimed that his employment status with the Library of Congress was adversely affected by an FBI investigation "based solely on the exercise of his associational rights resulting in concrete harms to his reputation and employment opportunities." *Id.* at 93. The uncontradicted testimony in *Clark* established that the plaintiff "suffered mental anguish and was chilled in the exercise of his first amendment rights as a result of the investigation." *Id.* at 91. Here, in contrast, Petitioner Moore has not raised any allegations that are even remotely similar.

Likewise, the statement (Petition, at 18) that *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977), is a "case remarkably like the present case" is grossly misleading. In *Cullen*, plaintiffs alleged that they were compelled to contribute at least one percent of their salaries to the county committee of the Republican Party to obtain a promotion. *Id.* at 550. In contrast to *Cullen*, it is not (and could not be) alleged in this case that Petitioners were forced to make financial contributions to the Republican Party. Petitioners' suggestion that jobs, promotions and transfers are "conditioned" on financial support to the party (Petition, at i) represents an untimely and unfounded effort to amend the complaint.[13]

[13] The other authorities upon which Petitioner Moore relies do not provide any basis for Supreme Court review. The Third Circuit has acknowledged that its suggestion in *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.) *cert. denied*, 434 U.S. 892 (1977), that a state may not condition hiring on political factors was "pure dicta."

(Footnote continued on following page)

In sum, there is no conflict among the courts of appeal on the issue raised by Petitioner Moore's allegations. Elected officials may take broadly defined "political considerations" into account in hiring public employees. Petitioner Moore's reliance on decisions involving dramatically different facts and legal claims confirms that there is no basis to review the Seventh Circuit's dismissal of his claim by a writ of certiorari.

B. There Is No Conflict On The Promotion And Transfer Claims Alleged.

In this case, the Seventh Circuit also was faced with the question whether Petitioners Rutan and Taylor stated a constitutional claim because they allegedly failed to obtain the promotions or transfer which they desired, based substantially, but not wholly, on broadly defined "political considerations." In answering this question, the Seventh Circuit extended *Elrod* to "protect employees from patronage practices that may, as a practical matter, impose the same burden as outright termination." *Rutan*, 868 F.2d at 952; (A-17). The Court remanded the claims of Petitioners Rutan and Taylor for a determination whether the particular employment actions complained of were "the substantial equivalent of a dismissal." *Id.* at 955; (A-25).

Petitioners Rutan and Taylor assert that this holding abandons several Seventh Circuit decisions upholding the First Amendment rights of public employees, and "con-

[13] *continued*

Mazus v. Department of Transportation, 629 F.2d 870, 873 (3d Cir. 1980). The only other case cited by Petitioner Moore, *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), involved the right to privacy and "appellant's interest in family living arrangements, procreation and marriage." It is simply irrelevant to the issues raised in this case.

flicts sharply with the majority of the Courts of Appeal." (Petition, at 12, 13 n.5.) These contentions rest on a fundamental misapprehension of the issues raised by Petitioners Rutan's and Taylor's claims.[14]

The contention that the Seventh Circuit has overruled several of its prior decisions, *sub silentio*, underscores the attempt by Petitioners Rutan and Taylor to avoid the allegations of their complaint. In each of the decisions upon which Petitioners Rutan and Taylor rely, the plaintiffs suffered punitive employment actions in direct retaliation for protected expression. *E.g.*, *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985) (teacher given negative evaluations, removed as athletic coach and transferred as a result of speech on matter of public concern); *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983) (former FBI agent involuntarily transferred and ultimately discharged after he alleged that other bureau personnel had engaged in wrongful conduct); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (plaintiff subjected to a pattern of harassment and ridicule in retaliation for her campaign for public office); *McGill v. Board of Education of Pekin*

[14] Petitioners also suggest that the Seventh Circuit's adoption of the "substantial equivalent of dismissal" test has the effect of relegating First Amendment rights to a position "vastly inferior" to Fourteenth Amendment rights. (Petition, at 19.) Presumably, this is so because the courts of appeal have never applied that standard to analyze the claims of public employees who have been denied positions on the basis of their race or sex. Respondents ignore the fact that this nation has not determined that "political discrimination" is subject to the same constitutional scrutiny as discrimination based on race or sex. *See LaFalce*, 712 F.2d at 294 ("To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics").

Elementary School, 602 F.2d 774 (7th Cir. 1979) (teacher involuntarily transferred in retaliation for expressing a complaint on school policy).

Here, in contrast, there is no allegation that any state employee has been transferred, harassed or in any way punished for his or her political beliefs. Petitioners Rutan and Taylor assert only that other employees received jobs, promotions or transfers which they themselves desired. (R.A. 14, 15, ¶¶ 19g, 20c, f.) This distinction was critical to the Seventh Circuit, which emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4). It was on this basis that the Seventh Circuit expressly distinguished *Bart v. Telford*, one of the cases Petitioners Rutan and Taylor now cite in an unsuccessful effort to show that the Seventh Circuit's decision in *Rutan* somehow departs from its prior decisions. *Id.*[15]

In light of this significant difference, the claims of Petitioners Rutan and Taylor are not advanced by their citation to decisions of other courts of appeal involving allegations of retaliation for the exercise of free speech. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), for example, the plaintiffs alleged that they had been demoted in

[15] Indeed, last month, the Seventh Circuit once again harmonized its precedents in precisely this way. In *Pieczynski v. Duffy*, 88-2381 (7th Cir., May 30, 1989), the court upheld a jury verdict in favor of an employee who had been subjected to a pattern of harassment because of her political alliance with an opponent of the then-Mayor of Chicago. In doing so, the court reiterated the critical distinction underlying *Rutan*: "It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees." Slip Op. at 4; (R.A. 30).

retaliation for their support of the Mayor's political opponent. In *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984), the plaintiff was transferred from his position as manager of an outdoor amphitheater to a job as a playground supervisor in retaliation for his union activities and refusal to settle a private lawsuit. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the sole issue before the court was whether a policeman may be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the plaintiff contended that he had been reassigned and transferred for political reasons to a less desirable position in another region of the country. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff alleged that her demands for payment relating to compensatory time and vacation time were denied solely because of her political affiliation.

Each of these cases is distinguished by a central allegation conspicuously absent from the complaint here: the plaintiffs in *Bennis*, *Robb*, *Waters*, *Delong* and *Lieberman* each suffered some concrete measure of retaliation (which disrupted their "settled expectations") as a direct result of protected expression. In contrast, this case does not involve allegations of punishment or retribution for political beliefs, but rather, the disappointment of Petitioners Rutan and Taylor that other employees received promotions or transfers which they themselves desired. Far from creating a "conflict" (Petition, at 12), the distinction drawn by the Seventh Circuit is entirely consistent with the distinction between direct and indirect burdens that was adopted in the hiring context by the Sixth Circuit in *Avery*. 786 F.2d at 235.

The only conflict that exists is with regard to an issue not presented in this case: the appropriate standard for resolving claims of political retribution short of dismissal. In *Delong*, the Fourth Circuit limited the reach of *Elrod* to punitive employment practices that "can be determined to be the substantial equivalent of dismissal." *Delong*, 621 F.2d at 624. In contrast to *Delong*, the Third Circuit has extended *Elrod* to prohibit "the imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d at 731. It may be that, in a case which appropriately presents the issue, this Court will have occasion to resolve this conflict concerning the standards for punitive transfer and demotion cases. However, the Seventh Circuit's decision to adopt the *DeLong* standard for non-punitive transfer and promotion decisions does not present such an occasion, and this is not an appropriate case for review.[16]

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[16] Because Petitioners' complaint does not allege the kind of direct punishment needed to trigger the *Keyishian* analysis, the appropriate standard under which to judge non-punitive denials of promotion and transfer presented a question of first impression. Accordingly, expressing reluctance to scrutinize Petitioners Rutan's and Taylor's pleadings "under freshly articulated standards," (*Rutan*, 868 F.2d at 955; (A-25-26)), the Seventh Circuit remanded their claims for a determination whether their failure to obtain the positions they sought was tantamount to dismissal. *Id.* at 955-56; (A-24-25). Upon the completion of discovery, the district court's application of this newly adopted standard may vitiate the need for further appellate review. Any grant of a writ of certiorari at this preliminary stage of the proceedings therefore would be improvident. *See Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). The court of appeal's remand for a determination of the various class allegations in the complaint (*Rutan*, 868 F.2d at 957 n.6; (A-30 n.6)), similarly militates against Supreme Court review at this stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

[Filed July 1, 1985]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

No. 85-3362

CYNTHIA RUTAN, FRANKLIN TAYLOR, DAN O'BRIEN, RICKY STANDEFER, and JAMES MOORE, individually and on behalf of Illinois Voters; CYNTHIA RUTAN, FRANKLIN TAYLOR, DAN O'BRIEN, RICKY STANDEFER, and JAMES MOORE, individually and on behalf of Illinois Taxpayers; CYNTHIA RUTAN, individually and in behalf of State of Illinois employees under the jurisdiction of the Governor desiring promotions; FRANKLIN TAYLOR, individually and in behalf of State of Illinois employees under the jurisdiction of the Governor desiring transfers; DAN O'BRIEN and RICKY STANDEFER, individually and in behalf of persons employed but laid off and not rehired by agencies under the jurisdiction of the Governor; JAMES MOORE, individually and in behalf of persons desirous of employment in agencies under the jurisdiction of Illinois, *Plaintiffs*,

v.

THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members; JAMES THOMPSON, individually and as Governor of the State of Illinois, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities; GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois

Departments, Boards and Commissions under the jurisdiction of the Governor.

Defendants.

COMPLAINT

Plaintiffs, named above and hereinafter, individually and on behalf of all others similarly situated, by their attorneys, Leahy and Leahy, complain against Defendants, named above and hereinafter, as follows:

Introductory Statement

1. This is a class action by Plaintiffs against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in concert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system.

2. This action also seeks compensatory and punitive damages for persons who have been, continue and will continue to suffer injury as a proximate result of Defendants' conduct.

3. This action also seeks compensatory and punitive damages for and in behalf of the people of the State of Illinois for the expenditure of public monies and public facilities by Defendants in operating and maintaining the political patronage system.

Jurisdiction

4. Plaintiffs bring this action pursuant to 42 *United States Code*, 1983, 1985, 1988. This Court has jurisdiction pursuant to 28 *United States Code* 1331, 1343. This Court should also entertain claims based upon State law by pendant jurisdiction.

PLAINTIFFS

Plaintiffs Who Are Voters

5a. Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James W. Moore, are citizens and residents of the State of Illinois and are registered voters and are members of and appropriate representatives of a class of persons, namely, voters in the State of Illinois, who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters.

5b. The number and identity of such voters in the class is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

5c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Taxpayers

6a. Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, are citizens and residents of the State of Illinois and are registered voters and are members of and appropriate representatives of a class of persons, namely, Illinois taxpayers, and are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent

on the operation and maintenance of a State political patronage system.

6b. The number and identity of such taxpayers in the class is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

6c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Employees Seeking Promotion

7a. Plaintiffs, Cynthia B. Rutan and Franklin Taylor, are residents, taxpayers and voters of the State of Illinois and are employees of the State of Illinois and are members of and appropriate representatives of a class of persons who are promotable employees in a department, board or commission under the jurisdiction of the Governor of Illinois but who have been and are denied promotion because they are not deemed politically acceptable or approved by Defendants.

7b. The number and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

7c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individual named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Employees Desiring Transfers

8a. Plaintiff, Franklin Taylor, is a resident, taxpayer and voter of the State of Illinois and is a member of and an appropriate representative of a class of persons who are employees of the State of Illinois in a department, board or commission under the jurisdiction of the Governor and who are desirous of transfers in their employment but have been and are denied transfers because they

are not deemed politically acceptable or approved by Defendants.

8b. The number and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

8c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiff be designated as representative of the class.

Plaintiffs Who Have Been Laid Off By The State Of Illinois and Not Rehired

9a. Plaintiffs, Dan O'Brien and Ricky Standefer, are residents, taxpayers and voters of the State of Illinois and are members of and appropriate representatives of a class of persons who have been laid off from employment in departments, boards or commissions under the jurisdiction of the Governor and who have been and are prevented or impaired from being recalled to work or prevented or impaired from an equal opportunity to obtain employment with the State of Illinois because they are not deemed politically acceptable or approved by Defendants.

9b. The numbers and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

9c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Not Employees But Who Wish To Be Employees

10a. Plaintiffs, James W. Moore, is a resident, taxpayer and voter of the State of Illinois and is a member of and

appropriate representative of a class of persons who have been and are desirous of becoming employees of the State of Illinois, but have been denied employment because they are members of a class of persons who have been and are prevented or impaired from an equal opportunity to obtain employment in departments, boards and commissions under the jurisdiction of the Governor because they are not deemed politically acceptable or approved by Defendants.

10b. The numbers and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

10c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiff be designated as representative of the class.

The Patronage System

11. Since on or before February 1, 1981, Defendants, have maintained and operated a political patronage system in the State of Illinois, which operates under the following circumstances and the following manner:

11a. More than fifty departments, boards and commissions under the jurisdiction of the Governor of Illinois employ approximately 60,000 persons.

11b. During each year more than 5,000 jobs become available as a result of resignations, retirement, death, expansion, changes in classifications, reorganizations and other changes in the departments, boards and commissions under the jurisdiction of the Governor.

11c. On November 12, 1980, Defendant Thompson issued an executive order which requires his personal approval or that of a designee before any individual may be hired or promoted by any department, board or commission under the jurisdiction of the Governor. Attached hereto and incorporated herein as Exhibit A is the Executive Order.

11d. Defendant Thompson has assigned the power to approve or disapprove such employment transactions to employees in his office who operate under what is styled the "Governor's Office of Personnel."

11e. The "Governor's Office of Personnel" controls all hiring, transfers, promotions and other significant aspects of employment by approving or disapproving such transactions on an individual basis using the Executive Order as its authority.

11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.

11g. In giving or refusing approval of a particular individual for a particular employment position the "Governor's Office of Personnel" makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level.

11h. The Republican Party screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future "volunteer" work by the applicant in behalf of the Republican Party and its candidates. Attached hereto and incorporated herein as Ex-

hibit B is the application form for promotion in State government employment used by the Republican Party in Sangamon County.

11i. Within State departments, boards and commissions under the Governor's jurisdiction selected employees serve as liaisons between the "Governor's Office of Personnel" and the departments, boards or commissions on employment matters. These persons bear titles such as "Administrative Assistant," "Assistant to the Director" or similar labels. The liaison's function is to become aware of, keep track of and inform the "Governor's Office of Personnel" as to openings, promotions and similar matters so that the "Governor's Office of Personnel" can give those who are politically favored employment and promotions.

11j. The Directors and Heads of State departments, boards and commissions under the Governor's jurisdiction share legal authority with the Department of Central Management Services in approving or disapproving matters of personnel transactions under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.* These Directors or Heads have and are cooperating in the patronage system by active participation or by giving an employee such as the liaison power to make employment decisions.

11k. The purpose and effect of the political patronage system operated under the "Governor's Office of Personnel" is to limit State employment and the benefits of State employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits and thereby provide the Governor, the Republican Party and Republican candidates for political office with political campaign contributors and to discourage opposition to the Governor and the Republican Party in elections. This system thereby creates a significant political effort in favor of the "ins" i.e. defendant James Thompson and his political allies and against the "outs" i.e. those who may wish to challenge in elections.

DEFENDANTS

The Republican Party In Illinois

12a. The Republican Party in Illinois is composed of several parts, the two principal parts being the Republican State Central Committee and County Central Committees.

12b. In 101 of the 102 counties in Illinois, party officials are elected in party primaries at the precinct level. In each of the 101 counties, the precinct committeemen elect one of their members as chairman of the Republican County Central Committee.

12c. In Cook County committeemen are elected by Republican primary voters for each Ward (Chicago) and each Township (Suburban Cook County). These committeemen elect a county chairman. These committeemen each have the power to appoint precinct captains in their respective Wards or Townships.

12d. The Republican State Central Committee is composed of party representatives from the several congressional districts in Illinois. They in turn elect a state chairman.

12e. The most recent publication of the State Board of Elections of the State of Illinois (1984-1985) lists the names of approximately 5,400 Republican precinct committeemen (101 counties), 80 Township and 50 Ward Committeemen (Cook County) and 54 members of the State Central Committee.

12f. The Republican Party of the State of Illinois and the County Republican Party organizations exist as private organizations to promote the goals of the Republican Party and its candidates.

Defendants Who Are Officials of the State Republican and County Republican Central Committees

13a. Defendant, Don Adams, is an adult resident of Sangamon County, Illinois, and is chairman of the Republican State Central Committee.

13b. Defendant, Irvin Smith, is an adult resident of Sangamon County, Illinois, and is Chairman of the Sangamon County Republican Central Committee.

13c. Defendants, Adams and Smith, are members of and appropriate representatives of a class of Defendants, namely all Republican State Central Committee and County Central Committee officials and members including all present precinct captains and precinct committeemen and all persons who held such positions at any time since February 1, 1981.

13d. The members of this class of Defendants screens and limits and prevents persons, other than those politically acceptable and approved, from becoming employees in departments, boards or commissions under the jurisdiction of the Governor or, once employed, from receiving other benefits of employment.

13e. The number and identity of the officials of the Republican Party is so large and varied that it is not practical that they be brought before the court except by an appropriate representative.

13f. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate the individually named Defendants be designated as representatives of the class.

Defendant James Thompson

14a. Defendant James Thompson is an adult citizen and resident of the State of Illinois with residences in Springfield, Illinois and Chicago, Illinois, and in 1976, 1978 and 1982 was the Republican Party candidate for Governor of the State of Illinois and continuously since January of 1977 has served as Governor of the State of Illinois.

14b. Defendant Thompson has established, maintained and permitted the operation of the employment patronage system outlined in Paragraph 11.

Defendants Who Manage And Supervise Employment Patronage System

15a. Defendant, Mark Frech, is an adult resident of Morgan County, State of Illinois, and has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, since February 1, 1981, as an Assistant Director or Director of the "Governor's Office of Personnel."

15b. Defendant, Greg Baise, is an adult resident of Sangamon County, State of Illinois, and was employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois since before February 1, 1981, until the Spring of 1983 as the Director of the "Governor's Office of Personnel." Defendant has been and continues to be the chief executive officer of the Department of Transportation of the State of Illinois since leaving his position in the Governor's Office.

15c. Defendant William Fleischli, is an adult resident of Sangamon County, State of Illinois and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an assistant Director of the "Governor's Office of Personnel."

15d. Defendant, Randy Hawkins, is an adult resident of Sangamon County, State of Illinois, and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an Assistant Director of the "Governor's Office of Personnel."

15e. Defendant, Kevin Wright, is an adult resident of Sangamon County, State of Illinois, and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an Assistant Director of the "Governor's Office of Personnel."

15f. Defendant, James Reilly, is an adult resident of Morgan County, State of Illinois, and has since before

January 1, 1984, been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, with supervisory power over the governor's staff and has been and is the immediate supervisor of Defendant Frech; in turn, Defendant Reilly reports directly to and is immediately supervised by Defendant Thompson.

15g. The Defendants named in paragraphs 15a through 15f have as a major duty the supervision and administration of the Governor's patronage system as described in paragraphs 11a through 11f; these Defendants have and do spend a substantial part of their time in pursuit of this venture and their salaries and the expenses of running the Governor's Office of Personnel is paid for by tax dollars. Defendants Baise and Wright did serve in the Governor's Office of Personnel, but now have other state employment positions under the jurisdiction of the Governor.

Defendants Who Serve As Employee Liaisons

16a. Defendant, Lynn Quigley, is an adult resident of Sangamon County, State of Illinois, and is a member of and appropriate representative of a class of persons, namely, employees of the State of Illinois and those who have held such positions since February 1, 1981, who are assigned to and do facilitate the placing of politically approved persons in the various departments, boards and commissions under the jurisdiction of the Governor and serve as liaisons with the Governor's Office of Personnel.

16b. The number and identity of such "liaisons" is so great and varied that it is impractical that they be brought before the court except by an appropriate representative of the class.

16c. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate Defendant Quigley be designated representative of the class of Defendants who serve or have served as liaisons with the Governor's Office of Personnel.

Defendants Who Are Directors and Heads of State Departments, Boards and Commissions

17a. Defendant, Gregory Baise, is an adult resident of Sangamon County, State of Illinois, and is the Secretary of the Illinois Department of Transportation.

17b. Defendant Baise is the chief executive officer of Illinois Department of Transportation and is a member of and an appropriate representative of a class of individuals, namely Directors, Heads or Chief Executive Officers, and all who held such a position since February 1, 1981, of departments, boards and commissions under the jurisdiction of the Governor of the State of Illinois.

17c. Defendant Baise and the other members of the class have supported, approved or knowingly permitted the operation of the political patronage system in the departments, boards or commissions under their control.

17d. The number and identity of such directors or chief executive officers is so large and varied that it is impractical that each be brought before the court except by an appropriate representative of the class.

17e. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate the individually named Defendant be designated as representative of the class.

Status of Defendants

18. Each Defendant is being sued in his individual and official capacity.

Circumstances of Individual Plaintiffs

Plaintiff Cynthia B. Rutan

19a. In particular Plaintiff Rutan began to work for the Department of Rehabilitative Services of the State of Illinois on May 16, 1974, and has worked for said department continuously since that date.

19b. Since the Fall of 1981 Plaintiff Rutan has repeatedly applied for supervisory vacancies in the Bureau of Adjudicative Services in the Department of Rehabilitative Services, which vacancies would have been a promotion for her.

19c. Each of these positions falls under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101.

19d. Each one of these positions was and continues to be funded with federal tax dollars under the Social Security Entitlement Program; as such, these positions should not be filled on a patronage basis.

19e. In the Fall of 1983 Plaintiff Rutan obtained a copy of the form attached hereto and incorporated herein as Exhibit "B" from the Sangamon County Republican Central Committee, which form is used by the Republican Party and the Governor's Office of Personnel in promoting employees in departments, boards and commissions under the jurisdiction of the Governor.

19f. Plaintiff has not been active in the Republican Party nor supported Republican candidates for office.

19g. Each one of the supervisory positions for which Plaintiff Rutan applied was filled by someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel.

Plaintiff Franklin Taylor

20a. Plaintiff Taylor began to work for the Illinois Department of Transportation (I.D.O.T.) in 1969 as an equipment operator and has worked continuously for the Department since that date.

20b. In July of 1983 Plaintiff Taylor applied for a lead worker's position which would have been a promotion and which falls under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101.

20c. Medford Phillips, another I.D.O.T. employee, who was less qualified and had less seniority than Plaintiff Taylor got the lead worker position; Medford Phillips had received the support and approval of the Fulton County Republican Party for the position.

20d. Since 1969 Plaintiff Taylor has been assigned to Fulton County.

20e. In the Summer of 1983 Plaintiff Taylor began to ask to be transferred to Schuyler County, the county in which he resides.

20f. Plaintiff Taylor has been advised that his transfer cannot be granted because both the Fulton County and Schuyler County Republican County Chairmen oppose the transfer.

20g. Plaintiff Taylor has not been active in the Republican Party nor has he actively supported Republican candidates.

Plaintiff Ricky Standefer

21a. On or about May 12, 1984, Plaintiff Standefer was hired in a temporary position at the State Garage in Springfield, Illinois.

21b. In November of 1984 Plaintiff Standefer was laid off along with five other employees.

21c. All five other employees were offered other jobs but Plaintiff Standefer was not offered any other job in state government.

21d. The other laid-off employees who received job offers had the support of the Republican Party.

21e. Plaintiff Standefer had voted in the Democratic primary.

Plaintiff Dan O'Brien

22a. Plaintiff O'Brien began to work for the State of Illinois as a support service worker (dishwasher) at the

Lincoln Development Center of the Department of Mental Health and Developmental Disabilities on April 1, 1971.

22b. Plaintiff O'Brien continued to work at the Center until April 5, 1983, when he was laid off; at that time he was a Dietary Manager I.

22c. Under the rules of the Department of Central Management Services a laid-off employee can be recalled within two (2) years of lay-off; recall within that time period means no loss of seniority and continuation of other employment benefits.

22d. In December of 1984 Chuck Cicci, business administrator for the Lincoln Development Center told Plaintiff he was going to be recalled to work and that Cicci was waiting for the exception to the freeze executive order to be approved by the Governor's Office in Springfield so Plaintiff could be recalled.

22e. In mid or late February of 1985 Superintendent Johnson, head of the Lincoln Development Center, told Plaintiff the exception to the freeze executive order had been denied by the Governor's Office in Springfield.

22f. Plaintiff has voted only once in a primary election, that once was in a Democratic primary.

22g. After Plaintiff O'Brien had been laid off for several months, Plaintiff O'Brien attempted to get employment with the Department of Corrections; ultimately Plaintiff was employed with the Department, with zero beginning seniority and at a lesser salary than he had earned at Lincoln Development Center, but he obtained such employment only after he had obtained the support of Sapp, the Chairman of the Republican Party of Logan County.

Plaintiff James Moore

23a. Plaintiff Moore was honorably discharged from the United States Army in 1958 and qualifies for Veterans Status in seeking employment with the State of Illinois.

23b. Since 1978 Plaintiff Moore has sought employment with the State of Illinois particularly with the Department of Correction of the State of Illinois.

23c. In August of 1980 Plaintiff Moore received a letter from their Representative Bob Winchester (Republican) a copy of which is attached hereto as Exhibit "C."

23d. Plaintiff Moore then talked to Clyde Stallions, then the Republican County Chairman of Pope County, who repeatedly told Plaintiff that all he needed to get the job was two signatures, his and then Representative Bob Winchester's.

23e. While Plaintiff Moore has been attempting to get work with the State, Victor English, the son of the current Chairman of the Pope County Republican Central Committee, Brian Burk, the son-in-law of the Vice-Chairman and precinct committeewoman of the Pope County Republican Central Committee, and Dorris Thomas, Plaintiff Moore's Republican precinct committeeman, have all been hired by State government in positions for which Plaintiff Moore was qualified.

Claims As To Individuals And The Classes They Represent

24. The patronage employment system described in this complaint is unlawful and violates the United States and Illinois Constitutions and in one or more of the following respects:

24a. It violates the right of individuals to be free from discrimination in regard to matters of employment and to be free from penalties for the exercise of free speech, the right of association or for refraining from speech or political associations, which rights are protected by the First and Fourteenth Amendments to the United States Constitution.

24b. It violates the right of individuals to be free from discrimination in regard to matters of State employment because they do not belong to a favored group of political

and financial supporters of the Republican Party or are not friends of the Governor or are not otherwise politically acceptable to the Governor or his designee which right is protected by the equal protection clause of the Fourteenth Amendment of the United States Constitution.

24c. It violates the rights of citizens to have their property rights protected by the Due Process clause of the Fourteenth Amendment to the United States Constitution in that the system is totally outside procedures and practices of the *Personnel Code* of the State of Illinois (*Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.*) which provides a comprehensive procedure for the recruiting, examining, qualifying, hiring and retention of employees of departments, boards and commissions under the jurisdiction of the Governor, which statute creates certain property interests; the patronage system ignores and disregards rights provided by this statute.

24d. It violates the right of individuals to equal protection and the right to equal access and effectiveness of elections guaranteed by the Fourteenth Amendment to the United States Constitution in that it allows the Governor and the Republican Party of Illinois to coerce and enlist and reward political support and make use of such support throughout Illinois while at the same time the Democratic Party in Cook County, State of Illinois (its traditional stronghold) is restrained by orders of the United States District Court for the Northern District of Illinois in *Shakman v. Democratic Organization of Cook County*, No. 69-C-2145, from engaging in the employment practices outlined in this complaint in the offices held by Democrats.

24e. It violates the right of citizens to the form of government guaranteed by Article IV, Section 4 of the United States Constitution.

24f. It violates the Due Process clause and Equal Protection clause of Article I, Section 2 of the Constitution of the State of Illinois in that it:

1) Applies tax money for other than public purposes;

2) It discriminates against persons who are not politically favored.

24g. It violates the right of individuals to speak, write and publish freely without fear of becoming not favored in matters of public employment which right is protected by Article I, Section 4 of the Constitution of the State of Illinois.

24h. It violates the right of individuals to assemble, consult and make known their opinions without fear of becoming not favored in matters of public employment which right is protected by Article I, Section 5 of the Constitution of Illinois.

24i. It violates Article III, Section 3 of the Illinois Constitution by interfering with the right of the people to free and equal elections.

25. Each Defendant and the members of the classes of Defendants have knowledge of the system and have acted in concert with other Defendants to implement the goals and purposes of the employment patronage system as described in this complaint.

26. The various Defendants who are employees and officials of the State of Illinois have and continue to act under color of law in the implementation of the employment patronage system as described in this complaint.

27. The Defendants have kept secret and not disclosed to the Plaintiffs or the general public that Defendants have and are discriminating against Plaintiffs and the classes of persons of which Plaintiffs are members.

28. Defendants' conduct was and is in violation of established law which had been announced prior to 1980 by the United Sates District Court for the Northern District of Illinois in *Shakman v. Democratic Organization of Cook County*, No. 69-C-2145.

29. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, and the voters whom they represent have had the value of their votes diminished and have been denied a voice in government of equal effectiveness with other voters.

30. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, and the taxpayers whom they represent have been deprived of the benefit of more than $2,000,000 in tax monies of the State of Illinois which have been expended for the support of the patronage system and not for a governmental purpose.

31. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan and Franklin Taylor, and persons who are promotable employees have been denied promotion and the benefits of promotion including salary increases.

32. As a direct and proximate result of Defendants' conduct Plaintiff, Franklin Taylor, and employees of the State of Illinois desiring transfers have been denied transfers.

33. As a direct and proximate result of Defendants' conduct Plaintiffs, Ricky Standefer and Dan O'Brien, and other employees who have been laid off have been denied employment and recall, and the benefits of employment.

34. As a direct and proximate result of Defendants' conduct Plaintiffs, James W. Moore and other persons desirous of State employment have been denied such employment and such persons have been deprived of more than $500,000,000.00 in income which has been channeled to persons who have been deemed politically approved by Defendants through use of the patronage system.

35. Defendants' conduct was and continues to be in knowing violation of Plaintiffs' rights or in reckless dis-

regard of Plaintiffs' rights as guaranteed by the United States Constitution, entitling Plaintiffs to punitive damages against the Defendants individually.

WHEREFORE, Plaintiffs pray:

1. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the First Amendment to the United States Constitution.

2. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article IV, Section 4 of the Constitution of the United States.

5. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article I, Sections 2, 4 and 5 of the Illinois Constitution.

6. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article III, Section 3 of the Illinois Constitution.

7. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Illinois Personnel Code, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.*

8. That the Court enjoin each Defendant and members of the classes of defendants from maintaining and operating the patronage system described in this claim.

9. That the Court award damages in favor of Plaintiffs and the members of the classes represented in the amount of $500,000,000 (Five Hundred Million Dollars) in compensatory damages against Defendants and provide a system to award a specific amount of such damages to specific individuals in plaintiff classes.

10. That the Court award punitive or exemplary damages in the amount of $500,000,000 (Five Hundred Million Dollars) to Plaintiffs and against Defendants.

11. That the Court award damages against Defendants in the amount of $2,000,000.00 to be paid into the State Treasury as compensation for expenditure of public funds in the operation of the patronage system.

12. That the Court grant such other relief as may be deemed appropriate including but not limited to the appointment of a Receiver to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor in order to prevent further constitutional violations and to rectify the future effect of violations that have already occurred.

13. That issues subject to trial by jury be so tried.

14. That the Court award Plaintiffs attorney's fees, costs and expenses of litigation.

/s/ MARY LEE LEAHY
LEAHY AND LEAHY
919 S. Pasfield
Springfield, IL 62704
(217) 522-4411

EXHIBIT A

(Letterhead Of)

STATE OF [*Seal*] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER Number 5 - (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All hiring is frozen.* There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

EXHIBIT B

SANGAMON COUNTY REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET, SPRINGFIELD, IL 62701 No. [redacted]

PRINT OR TYPE

NAME _____ DATE _____

ADDRESS _____ PRECINCT _____ TOWNSHIP _____

TELEPHONE _____

VOTING ADDRESS IF DIFFERENT _____ PRECINCT _____

AGE _____ DATE OF BIRTH _____ SOCIAL SECURITY # _____

PRESENT POSITION _____ DEP'T _____

DESIRED POSITION _____ DEP'T _____

HOW LONG IN PRESENT POSITION _____

REASON FOR CHANGE _____ ARE YOU QUALIFIED? _____

GIVE NAME OF TEST TAKEN _____ GRADE _____ DATE _____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?

1984 _____ 1982 _____ 1980 _____ 1978 _____

(NOTE: If under age, question applies to parents.)
Enter name here: _____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Applicant

I RECOMMEND THE ABOVE APPLICANT BECAUSE _____

_____

_____
Signature of Precinct Committeeman

EXHIBIT C

(Letterhead Of)

GENERAL ASSEMBLY
STATE OF ILLINOIS
ROBERT C. WINCHESTER
STATE REPRESENTATIVE - 59th DISTRICT

August 15, 1980

James W. Moore, Sr.
Route 3, Box 278
Golconda, Illinois 62938

Dear Mr. Moore:

In response to your July letter requesting employment with the State of Illinois, please be advised that there are over 1,100 applications of file at the Vienna Correctional Center. Of those, 450 have been strongly recommended by the precinct committeemen within the Republican organization. This represents requests for employment from the 12 counties in the 59th legislative district.

At present we have 15 jobs to fill at Vienna. Pope County is assigned one of these positions to fill. There are a considerable amount of people on the Pope County waiting list. I do not know where your name is on that list. It is just simply a case of not having enough jobs for all the people requesting employment.

I might add though, that since I have been a State Representative, Pope County has received more jobs at the Vienna Correctional Center than they ever have before. In the past 90% of all jobs were filled with people from Johnson County, with the other 10% coming from the surrounding counties. We have reversed that with 10% coming from Johnson County and 90% coming from the surrounding counties.

I would suggest that you make contact with your precinct committeeman and your Republican County Chairman. You will have to receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office.

Sincerely,

/s/ BOB
Robert C. "Bob" Winchester
State Representative

RCW/jam

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2381
MARY PIECZYNSKI,

Plaintiff-Apppellee,

v.

KATHERINE DUFFY and ROBERTO MALDONADO,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 5644—**Harry D. Leinenweber,** *Judge.*

ARGUED APRIL 19, 1989—DECIDED MAY 30, 1989

Before CUMMINGS, POSNER, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Mary Pieczynski, an employee of the City of Chicago, brought this civil rights suit (42 U.S.C. § 1983) against the City and three of her supervisors, charging political harassment in violation of the First Amendment, which has of course been held applicable to the states and their subdivisions. The jury exonerated the City and one of the supervisors, but found the other two supervisors, Duffy and Maldonado, liable, and awarded Pieczynski $95,000 in compensatory damages and $7,500 in punitive damages. Duffy and Maldonado appeal, represented by the City. The City argues qualified immunity and also complains about the exclusion of certain

evidence and about the size of the damages award, but its major argument is that there is insufficient evidence of harassment to sustain the verdict. In making this argument the City, in an ill-mannered brief bristling with ad hominem criticisms of its adversary, presents the facts as it would have liked the jury to find them rather than the facts that a rational jury might have found against the appellants.

Claims of politically motivated personnel action in public employment abound in this circuit—*Elrod v. Burns*, 427 U.S. 347 (1976), which opened this particular floodgate, originated here—and it may be useful at the outset to try to harmonize the precedents in order to provide guidance to the bench and bar of this circuit. Our emphasis is therefore on Supreme Court and Seventh Circuit cases, but we shall refer to a few cases from the other circuits too.

1. The discharge of a public employee because of his political beliefs violates the First Amendment, *Elrod v. Burns, supra*, unless the employee's job is a policymaking position or a position of confidence, such that his employer should have a free hand in deciding whether to retain the employee, *Branti v. Finkel*, 445 U.S. 507 (1980); *Bicanic v. McDermott*, 867 F.2d 391 (7th Cir. 1989); *Kurowski v. Krajewski*, 848 F.2d 767, 769-70 (7th Cir. 1988); *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir. 1985).

2. A discharge is not *because* of the employee's political beliefs if the employee would have been discharged regardless of those beliefs, even if the reason he would have been discharged anyway, while nonpolitical, is thoroughly disreputable, such as nepotism. *Byron v. Clay*, 867 F.2d 1049, 1051 (7th Cir. 1989) (dictum); *Lindahl v. Bartolomei*, 618 F. Supp. 981, 990-91 (N.D. Ind. 1985). The First Amendment is not a civil service statute.

3. A discharge does not violate the First Amendment even though the only reason for the discharge is political, if reinstatement or the other relief requested would vio-

late strong public policy, for example as embodied in state criminal prohibitions of "ghost employment" (which means being on the public payroll without doing any work). *Byron v. Clay, supra*, 867 F.2d at 1051-52. To that extent—but to that extent only—there is a defense of "unclean hands" (if equitable relief is sought) or "*in pari delicto*" (if legal relief is sought). But the mere fact that valid grounds exist for discharging the worker will not excuse the employer if, had it not been for the worker's political beliefs, he would not have been discharged. See *id.* at 1051; *Shondel v. McDermott*, 775 F.2d 859, 869 (7th Cir. 1985).

4. Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs. See, e.g., *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988). The harassment need not be so severe as to amount to constructive discharge—that is, it need not force the employee to quit, by making work unbearable for him. *Lieberman v. Reisman*, 857 F.2d 896, 900 (2d Cir. 1988); contra, *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980).

5. A statute or ordinance, general in terms, governing public employment does not violate the First Amendment even if enacted in retaliation against a group of public employees for their political views or activities. *Fraternal Order of Police v. City of Hobart*, 864 F.2d 551 (7th Cir. 1988); cf. *Rateree v. Rockett*, 852 F.2d 946, 950-51 (7th Cir. 1988).

6. Political criteria are permissible in hiring, although not in firing. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954-55 (7th Cir. 1989) (en banc); cf. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (permitting the use of political criteria in awarding public contracts). The principle has been extended to transfers following the abolition of particular jobs—as a practical matter such transfers are hires. See *McDonald v. Krajewski*, No. 88-3190, slip op. at 3 (7th Cir. May 5, 1989).

7. Political criteria are also permissible in promotions and in transfers between existing jobs unless the practical consequence for an employee adversely affected by the application of the criteria is to discharge him. *Rutan v. Republican Party of Illinois, supra*, 868 F.2d at 955-56; contra, *Bennis v. Gable*, 823 F.2d 723, 731-32 (3d Cir. 1987). This use of politics is thus treated differently from harassment targeted on particular employees (*Bart v. Telford, supra*). "[A]cts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan v. Republican Party of Illinois, supra*, 868 F.2d at 954 n. 4. It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees.

Do the decisions establishing as the law of this circuit the propositions we have set forth compose a pattern, or a crazy quilt? We discern a pattern, albeit of the rough-and-ready sort characteristic of common law adjudication. The courts, interpreting a vague constitutional command in circumstances remote from those envisaged by the framers, feel the tug of opposing policies. See, e.g., *LaFalce v. Houston, supra*; *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc). On the one hand, retaliating against public employees for their political beliefs may strip a significant (although not, characteristically, an outspoken) part of the community, namely rank-and-file civil servants, of freedom of political expression. The broader public will be losers as well, to the extent that public employees have valuable insights and information about the operation of government to convey. (Yet the constitutionality of the Hatch Act, which forbids federal employees to take an active role in political campaigns, has been upheld against a First Amendment challenge. See *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).) On the other hand, the First Amendment can hardly be thought to command a thorough purging of politics from politics and the reconstruction of all of American

government on the city-manager model. Such a program would be as quixotic as it would be undemocratic, and in preventing government officials from rewarding loyal supporters with government jobs or government contracts could diminish rather than intensify the energy of political debate.

The balance that has been struck confines constitutional protection to public employees who do not occupy a position of confidence or of responsibility for making policy, and who either lose their jobs or are made targets of on-the-job harassment in retaliation for failing to support the incumbent, and who neither are "ghost workers" nor would have been fired or disciplined on any (other) nonpolitical ground, so that their only offense is their politics. This fairly narrow class of protected employees presents the most sympathetic case for judicial intervention, because the affront to First Amendment values is patent, while the interest in loyal and effective government is minimally impaired by judicial intervention in such a case. The balance is different when a newly elected official seeks to fill jobs with the people who made his victory possible or wants confidential employees whom he trusts and policymaking employees who share his policy views.

Yet even the case we have described as the strongest for judicial intervention is problematic, for reasons related to judicial capacity to find facts and well illustrated by the present case. "Harassment" that is divorced (as here) from any racial or sexual overtones is exceedingly difficult to distinguish in practice from the normal friction between supervisory and subordinate employees; as a result, the existence of a constitutional tort of political harassment places public employers at the mercy of the vagaries of juries. Employees may try to buy themselves immunity from discipline by staking out a political position opposed to that of their employer, then ascribing to political persecution every act of discipline, every adverse change in working conditions, every failure of consideration by a superior, and finally bringing a suit for compensatory damages based on vague emotional malaise, and seeking punitive damages to boot.

It would be nice to be able to filter out the phony cases but we have been unable to think of a good filter beyond what is already provided by pretrial discovery and summary judgment and Rule 11 and directed verdict and remittitur and the other checks on groundless cases and runaway juries. In the end much will depend on the good sense of juries, and our faith in the jury is not so great that we can regard this prospect with equanimity.

The present case is exceedingly thin and the plaintiff may owe her victory largely to the heavy-handed tactics of the City's lawyer, who in closing argument repeatedly called Mrs. Pieczynski a liar and challenged the jury to award her a million dollars if it disagreed. "He [the plaintiff's counsel] is asking for $100,000. You might as well give her a million dollars. If you believe that, give her all the money in the world." Poor representation of state and local government is an old story.

Mary Pieczynski had been hired in 1980 as a secretary to Edward Scanlon, Director of Management Services in the Mayor's Office of Employment and Training, at a salary of $10,600. Both she and Scanlon were members of the 10th Ward Democratic Organization, headed at the time by Alderman Edward Vrdolyak; she owed her job with Scanlon to this political connection. In 1983 Pieczynski was promoted to an executive position in the office, at a salary of $18,000 which by the time of trial had risen to $25,000. Shortly afterward, Harold Washington—a bitter enemy of Vrdolyak—was elected Mayor, and eventually Scanlon left and was replaced on an acting basis by Pieczynski. In November 1984 defendant Maldonado was appointed the permanent successor to Scanlon. Maldonado reported to defendant Duffy, the recently appointed Deputy Director of the Mayor's Office of Employment and Training. Both Duffy and Maldonado were supporters of Mayor Washington, and there was much bad blood at the time between Washington and Vrdolyak, who were fighting for control of the City Council. There was evidence from which a reasonable jury could infer that both Duffy and Maldonado knew of the plaintiff's connection with

Vrdolyak, for she and her husband were heavily involved in public activities on Vrdolyak's behalf.

Two months after Duffy's appointment (and one month after Maldonado's), Duffy wrote a memo to the City's Department of Personnel requesting that disciplinary action be taken against Mrs. Pieczynski for a number of alleged misdeeds, such as using an unauthorized parking place. The jury was entitled to find that these accusations were baseless; and in fact no disciplinary action was taken against her. Then Maldonado took up the cudgels, accusing Pieczynski of taking a bribe by accepting a gift of a cordless telephone from a city contractor, confining her duties to monotonous paper work, terminating her supervisory authority over other employees, removing her long-distance line (so that she had to borrow another employee's phone when she had a long-distance call to make, as her work required her often to do), calling her a liar, denying requests for vacation time and administrative leave, abusing her for leaving work early one day to pick up an ill child, failing to introduce her to new employees, turning down her repeated requests to change her lunch hour, and failing to invite her to his birthday party. To all these accusations (the last of which, at least, is absurd, for the party took place after this suit was filed, and the First Amendment does not require the defendant in a lawsuit to invite the plaintiff to his birthday party) the defendants presented reasoned defenses, emphasizing for example that after Maldonado replaced Pieczynski *of course* her supervisory duties were curtailed. And the plaintiff's counsel soared into outer space in closing argument, arguing that Maldonado, a psychology major in college, had learned in Psychology 101 "how to drive mice nuts" and had used his learning to torment Mrs. Pieczynski.

But we cannot quite say that no rational jury would have believed Mrs. Pieczynski's version of the facts. For example, while the defendants presented evidence that her long-distance phone line was one of five or six removed as an economy measure, she rebutted with evidence that when later 40 new long-distance lines were installed she

wasn't given one even though she needed it for her work. Taking the facts as favorably to her case as reason permits, we cannot say that she was not the victim of a calculated campaign to humiliate her, drive her to resign, even break her health, in punishment for her association with the hated Vrdolyak. And such a campaign violates the First Amendment.

The other issues can be dealt with very briefly. *Bart v. Telford, supra*, scotches the defendants' defense of qualified immunity. Decided before the election of Mayor Washington, *Bart* holds that a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations violates the First Amendment. The facts were different from those of this case—one of the alleged acts of retaliation directed against Miss Bart was making fun of her for bringing a birthday cake to an office party, and there is a birthday party but no cake in this case. But the principle that a campaign of petty harassments can violate the First Amendment (unless *de minimis*) was clearly stated in *Bart*, and should have placed these defendants on notice that false accusations and petty humiliations, if orchestrated into a campaign of political retaliation, are actionable. See *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987); *Kurowski v. Krajewski, supra*, 848 F.2d at 773.

The judge excluded evidence that the defendants disciplined and otherwise took adverse action against persons under their supervision who were supporters of Mayor Washington and promoted or otherwise treated favorably several opponents of Washington. Of course such evidence must be let in if the plaintiff has been allowed to present evidence to show a pattern of discrimination. Cf. *Miller v. Poretsky*, 595 F.2d 780, 784-85 (D.C. Cir. 1978). But if the plaintiff presents no such evidence the trial judge has a broad discretion to exclude the defendant's proffer, a discretion that was not abused here. Just as it is not a defense to racial discrimination in employment that the employer mistreated some of his white employees and didn't mistreat all of his black employees, so it is not

a defense to a claim of political retaliation in employment that not *all* personnel decisions by the employer were politically motivated. It might be quite feasible to intimidate an entire office by picking on one employee, and this strategy should not buy a form of legal immunity. The evidence that the City wanted to put in was not entirely devoid of probative value, especially the evidence that the defendants had promoted known Vrdolyak supporters. But allowing the evidence in would have extended the trial indefinitely since the parties would have wanted to delve into the circumstances surrounding each personnel action. This is just the sort of situation in which trial judges must exercise an informed judgment under Fed. R. Civ. P. 403 which in this age of extraordinarily heavy judicial caseloads we will rarely be disposed to disturb. Cf. *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929 (7th Cir. 1984).

The compensatory damages were heavy, considering that Mrs. Pieczynski retained her job, salary, benefits, etc. in the face of the alleged campaign of harassment. Nevertheless Mrs. Pieczynski's doctor and priest as well as members of her family testified that she experienced severe emotional distress which aggravated an existing back condition and caused other physical suffering, extending over a period of years. Although as the City points out the damages awarded were greater than in other political harassment cases in this circuit, the other cases did not involve the same degree of emotional and physical distress. We cannot say that the damages awarded were *so* excessive—so "monstrously excessive," as the cases like to say—in the circumstances that the district judge was required to set the award aside. See *Cygnar v. City of Chicago*, 865 F.2d 827, 847-48 (7th Cir. 1989); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983). The tortfeasor takes his victim as he finds him (in this case her), so if the victim has a preexisting condition which the tort aggravates, the tortfeasor is liable for the full consequences. *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1294 (7th Cir. 1987); *Lancaster*

v. Norfolk & Western Ry., 773 F.2d 807, 820 (7th Cir. 1985); *Parrett v. City of Connersville*, 737 F.2d 690, 694-95 (7th Cir. 1984); *Stoleson v. United States*, 708 F.2d 1217, 1220-21 (7th Cir. 1983). The punitive damages were modest, assuming as we must that the defendants really did subject the plaintiff to a deliberate campaign of harassment perilous to her health, and did so for no better reason than that she supported an adversary of their political leader.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(3)

No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF INDEPENDENT VOTERS OF ILLINOIS-INDEPENDENT PRECINCT ORGANIZATION, BETTER GOVERNMENT ASSOCIATION AND MICHAEL L. SHAKMAN, AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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21 pp

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Independent Voters of Illinois-Independent Precinct Organization, Better Government Association and Michael L. Shakman respectfully move for leave to file the accompanying Brief Amici Curiae in support of the Petition for a Writ of Certiorari in this case. Written consent to the filing of the Brief has been obtained from the petitioners and from respondent governmental officials, including the Governor of the State of Illinois. Consents have not, however, been obtained from respondent The Republican Party of Illinois and its officials. This Motion is filed within the time allowed for the filing of the Brief in Opposition.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Better Government Association is a citizens' organization which promotes efficiency in governmental services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and a member of Independent Voters of Illinois-Independent Precinct Organization. He has been a candidate for public office. *Amici* have an interest in maintaining a free, fair electoral system. They also have an interest in maintaining freedom of political association; this is especially the case for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

In this case, the Court of Appeals for the Seventh Circuit has held that virtually every term and aspect of public employment, other than discharge, including hiring, salaries, promotions, demotions, transfers and the like, can constitutionally be conditioned on support of an officially favored political party. This was held to be the case not just for policy-making employees, but for all government workers.

Amici are concerned that this system, by which important terms of employment are conditioned on support of a favored political organization, is inconsistent with their interests in maintaining freedom of political association. As was recognized in *Elrod v. Burns*, 427 U.S. 347, 356 (1976):

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs.

Amici are also concerned that the effect of a politically conditioned employment system is inconsistent with their interests in a free and fair political process. Indeed, the whole point of such an employment system is for the coercive power of the state to be used to provide an electoral advantage for a favored political organization. As the Court noted in *Branti v. Finkel*, 445 U.S. 507, 513-14 n.8 (1980):

> [A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process.

The Petition for a Writ of Certiorari has, understandably, presented the case from the point of view of the serious impact which the practices in issue have on the First Amendment rights of public employees and job applicants. The proposed Brief *Amici Curiae* submits that the case is also important for review because of the impact which the practices in issue have on the rights of voters to a free and fair electoral system. This is a point on which the Petition does not focus.

Respectfully submitted,

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INTERESTS OF THE AMICI

This case concerns the constitutionality of the practice by which important terms and aspects of public employment, other than discharge, are conditioned on support of an officially favored political party. *Amici* are concerned with the harmful and unconstitutional effects such a politically conditioned employment system has on the functioning of the democratic political process, both by impairing the rights of the public to freedom of political association and in distorting the electoral process.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Better Government Association is a citizens' organization which promotes efficiency in government services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and member of Independent Voters of Illinois-Independent Precinct Organization who has been a candidate for public office. Each of the *amici* has an interest in promoting a free and fair electoral system. Each also have an interest in maintaining freedom of political association; this is especially so for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit, sitting *en banc*, has held that the Constitution permits the state to condition virtually every term or aspect of public employment, other than discharge, on support of a single officially favored political party. Under its decision, salary levels, promotions, demotions, transfers and similar material terms of public employment, as well as the opportunity to be hired at all, can be so conditioned so long as an employee is not actually or "constructively" discharged.

Amici submit that the decision of the Seventh Circuit is an important one for review. This Court has, in *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), held that the political firings are unconstitutional, but it has not specifically decided the question whether other important terms of public employment can be politically conditioned.

The issue is of substantial public significance. Not only are the First Amendment rights of millions of government employees at issue, the practices upheld by the Court of Appeals can significantly impair the freedom of political association of voters generally. And where, as here, the system by which jobs are politically conditioned is extensive, the electoral scales are designed to be tilted, denying voters a right to a free and fair electoral process.

The decision of the Court of Appeals here is, moreover, in sharp conflict with decisions of the other circuits which have held that public employment cannot be so conditioned on political affiliation and support. This conflict of circuits emphasizes the appropriateness of the case for review.

I.

THE QUESTION WHETHER IMPORTANT ASPECTS OF PUBLIC EMPLOYMENT CAN BE CONDITIONED ON POLITICAL AFFILIATION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Court's Decisions Have Strongly Suggested, But Not Explicitly Held, That Important Terms Of Public Employment, Other Than Discharge, Cannot Be Politically Conditioned.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that the First Amendment forbids the state from firing employees because of their political affiliation. This holding was confirmed in *Branti v. Finkel*, 445 U.S. 507 (1980), in which it was held that the Constitution similarly forbids the state to fire employees in order to accommodate politically motivated hirings of replacement workers.

The opinions in both *Elrod* and *Branti* strongly indicate that the Constitution would also bar the state from conditioning other important public employment decisions—hiring, promotions, job discipline and the like—on political affiliation. For example, in *Branti* the Court's opinion states that "it is difficult to formulate any justification for tying *either the selection or retention* of an assistant public defender to his party affiliation." 445 U.S. at 520 n.14 (emphasis supplied). This was not a casual remark. The dissent in *Branti* cited this statement in concluding that the decision "further limits the release of political affiliations to the *selection* and retention of public employees." 445 U.S. at 521 (emphasis supplied). Also at 522 n.2. The plurality opinion in *Elrod* similarly suggests that conditioning other employment decisions such as patronage *hiring* is constitutionally suspect. *Elrod*, 427 U.S. at 336, 369-70.

While *Branti* and *Elrod* are highly suggestive that political conditioning of important terms of employment other than firings similarly would abridge constitutional rights, the holdings in those cases dealt with political discharges. This Court has not explicitly ruled on whether the Constitution bars other important terms of public employment from being politically conditioned.[1]

[1] This Court has on numerous occasions, however, remarked that the hiring of public employees cannot constitutionally be conditioned on party affiliation. In *Branti*, 445 U.S. at 515 n.10, the Court noted:

> "The Court recognized in *United Public Workers v. Mitchell*, 330 U.S. 75, 100, [91 L Ed 754, 67 S Ct 556] (1947), that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . ."' This principle was reaffirmed in *Wieman v. Updegraff*, 344

(Footnote continued on following page)

The factual setting in which the present case arises squarely presents that issue. Important employment decisions, including hiring, salary levels, promotions and transfers, were alleged to be conditioned on political party affiliation. Politics was not just taken into account in the employment decisions in issue. It was the reason Cynthia Rutan did not receive the raise she had earned and otherwise would have received. It was the reason Franklin Taylor was kept from getting jobs for which he otherwise would have been hired.[2]

Indeed, the factual setting here makes the case particularly appropriate for review. The employment decisions involved here were neither *ad hoc* in nature nor isolated instances of errant judgment. To the contrary, the complaint alleges that a formalized state system, adopted by means of a gubernatorial executive order, conditioned thousands of nominally civil service jobs with the State of Illinois on political affiliation. And the complaint alleges that the system was so extensive as to give the favored

[1] *continued*

> U.S. 183, [97 L Ed 216, 73 S Ct 215] (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898, [6 L Ed 2d 1230, 81 S Ct 1743] (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party." Id., at 357-358, 49 L Ed 2d 547, 96 S Ct 2673."

[2] While the case was remanded on petitioners' claims relating to actual or constructive discharge, the decision of the Court of Appeals is final as to the claims of Mr. Taylor that he was kept from being hired for political reasons and as to the claims of the other petitioners that their constitutional rights were abridged by the denials for political reasons of their raises, promotions and transfers.

party a significant electoral advantage over other political groups.

B. The Case Raises Very Important Issues Both With Regard To First Amendment Rights Of Employees And With Regard To Rights Of Voters To A Free And Fair Political Process.

The issues in this case are important in two principal respects. Conditioning important job decisions on political affiliation and support plainly impairs the First Amendment rights of affected employees and applicants. And such a politically conditioned employment system seriously affects the rights of the community generally to freedom of political association and a fair election process.

1. The First Amendment Rights Of Public Employees And Applicants Are Seriously Impaired When Important Terms Of Employment Are Conditioned On Support Of An Officially Favored Political Party.

The practices in issue here seriously undermine the freedom of political association of public employees and applicants. Freedom of political association is inconsistent with the conditioning of important terms of one's employment on political affiliation. If your salary level depends on your continued support of a favored political organization, it is a fiction to say you have freedom of political association. If you can be demoted, or if you can be denied a promotion that you have earned, solely because of your political affiliation, you do not have freedom of political association. If you are denied the opportunity even to be considered for a job for which you are well qualified simply because you do not contribute money to a particular party committee, you do not have freedom of political association in any material way.

Jobs are important to people. Not only are they a livelihood, significant as that is, they provide a central element of self-worth. Conditioning job decisions and opportunities on politics accordingly is one of the most effective ways by which the state can chill rights of political speech and association. This was graphically illustrated by a recent report from China in the New York Times:

> "Everybody in Shanghai sympathizes with the students," said one bystander who identified himself as a computer engineer. "But they don't dare march because they are afraid of retaliation at their work site." The engineer said that workers had been worried that they could lose their salaries and possibly even their jobs if they took part in demonstrations.

New York Times, June 10, 1989 at 7 col. 1.

The issues raised in this case thus involve very important rights for public employees, who constitute a significant portion of the national work force. And the practices in issue here are not unique to this specific factual setting. Public employees and applicants across the country are subject to similar impairments of their rights of political association.

The decision of the Seventh Circuit would, moreover, severely undercut the holdings of *Branti* and *Elrod* that public employees may not be coerced through control over their employment into support of a favored political party. Where an employee's salary level, or her ability to get a promotion, or his potential of being demoted, rest on his or her political support (money and work), the employee is plainly subject to political coercion, barred by *Branti* and *Elrod*. A regime as allowed by the Seventh Circuit would re-indenture public employees to political masters.

In short, it is very difficult to draw either a constitutional distinction or much of a practical difference between basing firing decisions on political affiliation and conditioning other important job decisions on party affiliation. In either instance, the First Amendment rights of employees and employers are impaired.[3]

It is significant to note in this regard that Judge Manion's opinion for the Seventh Circuit does not deny that First Amendment rights of employees and applicants are impaired by the practices in issue. Rather, it concludes that no constitutional claim is presented, in part because that impairment is outweighed by the public benefit which a political employment system is said to provide. In this regard, the decision of the Court of Appeals runs plainly contrary to the analysis applied by this Court in *Branti* and *Elrod*. Indeed, the opinion in essence adopts the analysis of the dissent in *Branti* rather than the opinion of this Court. This further suggests the appropriateness of the case for review.

[3] Numerous law review articles have concluded that the principles in *Elrod* and *Branti* necessarily apply as well in the context of politically conditioned hiring and other job decisions. *See, e.g.*, Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181, 200 (1982); Note, 29 EMORY L.J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*, 71 MINN. L. REV. 1374 (1987).

2. A Politically Conditioned Employment System Impairs The Rights Of The Public To A Free And Fair Political System.

The practices in issue also raises an important question for review by this Court, *amici* submit, because of the impact of those practices on the political process generally.

First of all, the rights of voters generally to freedom of association are impaired. Conditioning jobs on support of one political organization necessarily injures the ability of competing political groups and their members to attract support, both among existing public employees and among those who wish to keep open the possibility of seeking employment. Where, as here, the political employment system is extensive and thousands of jobs are involved, the impact on the public's freedom of association is significant. Many, perhaps most, people will avoid openly supporting competing political groups if it means a significant disadvantage to their careers or a loss of employment opportunity.

This impact in terms of determining support of competing political groups was clearly recognized by the plurality opinion in *Elrod*:

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs.
>
> . . . .
>
> . . . Patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied). These observations are relevant, it is submitted, whenever significant terms of employment are politically conditioned.

Moreover, a politically conditioned employment system is inconsistent with the interests of voters to a free and fair electoral process. The effect of such a system is to use the coercive power of the state to produce money and support for the favored political organization as a price for favorable job decisions. Where, as here, such practices are extensive, they operate to tilt the electoral scales by providing electioneering support solely for a state-favored party. This is the whole point of the system—to give the favored party an electoral advantage. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. . . . Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.
>
> . . . .
>
> . . . Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369.

This point in *Elrod* was also recognized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

The present case is thus particularly important for review because the political employment system in issue here tends to undermine the whole democratic process, chilling support for competing political organizations and using coercive state power to give a discriminatory advantage to a favored political group.

3. Rights Of Minorities Are Especially Impacted By Politically Conditioned Hiring.

The case is further important for review because the rights of minorities are especially impacted by politically conditioned hiring. Public jobs are particularly important to minorities whose job opportunities may otherwise be limited. If hiring depends on party affiliation, minorities face a Hobson's choice of political freedom or economic well-being.

Moreover, race is a very significant factor in political party affiliation. Where jobs depend on political affiliation, minorities are out of luck as far as jobs are concerned in offices held by a party which does not represent their interests.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS.

The decision of the Seventh Circuit is, as it acknowledges, in direct conflict with the decisions of other Courts of Appeals. Contrary to the decision of the Seventh Circuit in the present case, the majority of the Courts of Appeals which have considered the issue have held that the First Amendment rights of public employees are abridged when important terms of employment are conditioned on political affiliation. See, for example, *Lieberman v. Reisman*, 857 F.2d 896, 900 (2d Cir. 1988) ("Whenever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987); *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984) (an allegation

that a failure to promote an employee because of his exercise of First Amendment rights held to state a claim).

Moreover, the decision of the Seventh Circuit is in conflict with the decisions of a number of the other circuits on the constitutionality of political hiring. In *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986), the Sixth Circuit stated that if hiring were based solely on politics, it would be unconstitutional. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the D.C. Circuit held it to be unconstitutional to deny an applicant employment because of his party affiliation. See also *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.) *cert. denied*, 434 U.S. 892 (1977) ("a state may not condition hiring or discharge of an employee in a way which infringes his right of political association"); and *Cullen v. New York State Civil Service Comm.*, 435 F.Supp 546 (E.D. N.Y.), *appeal denied*, 566 F.2d 846 (2d Cir. 1977) (conditioning hiring and promotion on campaign contributions held unconstitutional).

Given the importance of the issues, resolving the plain conflict among the circuits is especially necessary.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated June 16, 1989

No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The Petitioners will be brief in their response to the arguments raised by the Respondents.

ARGUMENT

The promotion, transfer and hiring system described in the Complaint is a strict political test: those persons politically favored are promoted, transferred and hired; those persons not politically favored are not promoted, transferred or hired. That is the very purpose and effect of the system.

In *Elrod v. Burns*, 427 U.S. 347 (1976), an employee of the sheriff's department had to obtain the sponsorship of, or affiliate with, the favored political party in order to retain his employment. That strict test is the very one used in the instant case. The form used in promotion (set forth verbatim in the Petition for Certiorari, pp. 8-9) requires affiliation and sponsorship. The factors considered are primary voting record, membership in the favored party political clubs, financial contributions to the favored party, and precinct work for that party. That form must be signed by the precinct committeeman of the favored party, indicating his sponsorship of the person applying for the promotion. That same strict test applies to transfer and hiring. *The* reason Petitioners Rutan and Taylor were not promoted was their political beliefs and affiliation. *The* reason Petitioner Taylor could not obtain the geographical transfer was because he could not obtain the approval of the Republican County Chairmen involved. *The* reason Petitioner Moore could not get a job was because he was not politically favored. There is no other reason. The only reason for the adverse action toward Petitioners was their political beliefs and associations; due to their political beliefs and associations they could not obtain the required affiliation and sponsorship.

Respondents' characterization of the denial of promotion, transfer or hiring as "non-punitive" is a contradiction in terms. Anyone who has supervised an employee knows there are two forms of punishment—each designed to bring behavior into desired conformity. Denying an employee a raise by denying promotion can have a more devastating impact than a two-day suspension. Both are forms of punishment. Both are designed to bring behavior into conformity with the desired conduct: financial "contributions" and "volunteer" support of the favored party and affiliation with that party.

CONCLUSION

This Court should grant the Petition for Certiorari to decide the important fundamental First Amendment issues raised by this case and to provide uniform law throughout the land.

Respectfully submitted,

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Nos. 88-1872, 88-2074

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OCTOBER TERM, 1989

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' BRIEF ON THE MERITS

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H90

QUESTIONS PRESENTED

1. Is it constitutional to deny a public employee a promotion due to his or her political beliefs or his or her party affiliation?
2. Is it constitutional to deny a public employee a transfer due to his or her political beliefs or his or her party affiliation?
3. Is it constitutional to deny a qualified applicant an opportunity for public employment due to his or her political beliefs or his or her party affiliation?
4. Is it constitutional to condition promotion or transfer of public employees upon political support of, or financial contribution to, a favored political party or candidate?
5. Is it constitutional to condition obtaining public employment itself upon political support of, or financial contribution to, a favored political party or candidate?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioners/Cross-Respondents:
CYNTHIA RUTAN, FRANKLIN TAYLOR, individually and in behalf of state employees under the jurisdiction of the Governor desiring promotions and transfer, DAN O'BRIEN and RICKY STANDEFER, individually and in behalf of persons laid off and not rehired by agencies under the jurisdiction of the Governor.[1,2]

Petitioner:
JAMES MOORE, individually and in behalf of persons desiring employment in agencies under the jurisdiction of the Governor and potential state employees denied benefits and persons denied employment.[2]

Respondents/Cross-Petitioners:
THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members;

[1] Cross-Respondents Standefer and O'Brien in this case claimed they were not recalled to state employment after lay-off due to their political affiliation. The Seventh Circuit reversed the dismissal of their claims holding the claims were political discharge cases falling under *Elrod v. Burns*, 427 U.S. 347 (1976). Cross-Respondents Standefer and O'Brien did not seek review of the Seventh Circuit's ruling as to them, but they are before this Court because this Court has granted the Cross Petition for Writ of Certiorari.

[2] The District Court failed to consider whether the petitioners may properly present this case as a class action. The Seventh Circuit Court of Appeals held this did not deprive that court of jurisdiction and proceeded to consider the claims presented by petitioners and cross-respondents. (A. 7).

JAMES THOMPSON, individually and as Governor of the State of Illinois;

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities;

GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; and

LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois Departments, Boards and Commissions under the jurisdiction of the Governor.

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Nos. 88-1872, 88-2074

IN THE

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' BRIEF ON THE MERITS

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988) and is reprinted in the appendix to the Petition for Certiorari, p. A-1. The opinion issued *en banc* is reported

at 868 F.2d 943 (7th Cir. 1989) and is reprinted in the appendix to the Petition for Certiorari, p. B-1.

The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641 F.Supp. 249 (C.D. Ill. 1986) and is reprinted in the appendix to the Petition for Writ of Certiorari, p. C-1.

JURISDICTION

This cause arose under 42 *United States Code* 1983, 1985. The United States District Court for the Central District of Illinois had jurisdiction under 28 *United States Code* 1331, 1343. On July 11, 1986, the District Court granted Respondents' motion to dismiss.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On June 8, 1988, the Court of Appeals held the denial of Petitioners Rutan and Taylor's promotions and transfer due to their political affiliation was not unconstitutional unless the denials constituted constructive discharge. Judge Ripple dissented.

The Court remanded the claims of Cross-Respondents Standefer and O'Brien that they had not been recalled to employment to see if their situations constituted coercion as prohibited by *Elrod v. Burns*, 427 U.S. 347 (1976).

The Court held the denial of an opportunity for employment due to Petitioner Moore's political affiliation was constitutional. Judge Ripple dissented.

On August 17, 1988, the Court of Appeals granted Petitioners' and Cross-Respondents' suggestion for rehearing *en banc*.

On February 16, 1989, the Court of Appeals sitting *en banc* (Judges Wood and Flaum not participating) entered a judgment and opinion substantially the same as the initial opinion. Judge Ripple again dissented, joined by Judge Cudahy, as to the holding regarding Petitioners Rutan and Taylor's claims. Judge Ripple further dissented from the affirmation of the dismissal of Petitioner Moore's claim.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment
To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 *United States Code* 1985

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or

of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Illinois Revised Statutes, Ch. 127, Sec. 63b102

63b102. Purpose

Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods.

STATEMENT OF THE CASE

This case was decided on a motion to dismiss. When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint are deemed admitted with every reasonable doubt resolved in favor of the pleader. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). (The Complaint filed in this matter is to be found in the Appendix to Respondent's Response to Petition for Certiorari, hereinafter referred to as R.A.)

This litigation was brought by five individuals who have been denied important aspects of employment due to their political beliefs and political associations. They have not supported the Republican Party or its candidates.

All positions in question, with the exception of that held by Ricky Standefer, fall under the civil service provisions of the Personnel Code of the State of Illinois. *Ill. Rev. Stat.*, ch. 127, sec. 63b101.

Cynthia Rutan has worked for the Department of Rehabilitation Services of the State of Illinois since 1974. (Disability Claims Specialist). She has repeatedly applied for promotion, but has been denied those promotions because of her political affiliation. She is qualified for the positions she sought. Those promotions have been given to persons less qualified than Cynthia Rutan. Cynthia Rutan has not supported the Republican Party or its candidates, but those persons put in the positions for which she applied have supported the Republican Party. Otherwise, she would have been promoted. (R.A., pp. 13-14).

When Cynthia Rutan was advised about the way this system operated, she went to the Sangamon County Republican Central Committee and obtained the promotion form which reads:

SANGAMON COUNTY REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET, SPRINGFIELD, IL 62701

PRINT OR TYPE
NAME_____DATE_____

ADDRESS_____ PRECINCT_____ TOWNSHIP_____

TELEPHONE_____

VOTING ADDRESS IF DIFFERENT_____ PRECINCT_____

AGE___ DATE OF BIRTH_____ SOCIAL SECURITY #_____

PRESENT POSITION_____ DEP'T_____

DESIRED POSITION_____ DEP'T_____

HOW LONG IN PRESENT POSITION_____

REASON FOR CHANGE_____ ARE YOU QUALIFIED?___

GIVE NAME OF TEST TAKEN_____ GRADE_____ DATE_____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?
1984_____1982_____1980_____1978_____

NOTE: (if under age, question applies to parents.)
Enter name here:_____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Applicant

I RECOMMEND THE ABOVE APPLICANT BECAUSE _____

_____

_____
Signature of Precinct Committeeman

(R.A., pp. 14, 24).

Franklin Taylor has worked for the Illinois Department of Transportation as an equipment operator since 1969. In July of 1983, he applied for a vacant lead worker position which would have been a promotion for him. He was denied that promotion due to his political affiliation. Medford Phillips was promoted to that vacancy. He was less qualified and had less seniority than Franklin Taylor, but Phillips had the sponsorship of the Fulton County Republican Party for that promotion. Franklin Taylor did not have that sponsorship. (R.A., pp. 14-15).

Franklin Taylor also sought a geographical transfer from Fulton County to Schuyler County, the county in which he resides. He was denied that transfer due to his political affiliation. The transfer would have placed his work site much closer to home. He was denied that transfer because the Republican County Chairmen in those two counties would not approve it. (R.A., p. 15).

Ricky Standefer was hired in a temporary position at the Illinois State Garage on May 12, 1984. In November of that year, Ricky Standefer and five other temporary employees at that Garage were laid-off. The five other employees were offered other jobs with the State because they had the sponsorship of the Republican Party. Ricky Standefer was not offered another job due to his political affiliation. He had voted in the Democratic primary. (R.A., p. 15).

Dan O'Brien began to work for the State of Illinois as a dishwasher at the Lincoln Development Center of the Department of Mental Health and Developmental Disabilities on April 1, 1971. Over the years, he continued to work at the Center and was promoted. On April 5, 1983, he was laid off; at that time he was a Dietary Manager I. (R.A., pp. 15-16).

Under the Personnel Rules adopted pursuant to the Illinois Personnel Code, Dan O'Brien could have been recalled within two years of that lay off. Had he been recalled, he would not have lost any seniority or other employment benefits. (R.A., p. 16).

In December of 1984, Chuck Cicci, business administrator for the Lincoln Developmental Center, told Dan O'Brien he was going to be recalled to work as soon as his recall was approved by the Governor's Office of Personnel. In February of 1985, Superintendent Johnson, head of the Lincoln Developmental Center, told O'Brien the Governor's Office of Personnel had denied his recall from lay-off. (R.A., p. 16). He was denied that recall due to his political affiliation.

Dan O'Brien had voted in the Democratic primary election. (R.A., p. 16).

Armed with the knowledge of how the system operates, he then worked to gain the support of Joe Sapp, the Logan County Republican Chairman. Soon after receiving Sapp's support, he was hired by the Department of Corrections. However, he lost 12 years of seniority and he received less salary than he would have earned had the Governor's Office of Personnel not rejected his recall from layoff as a Dietary Manager I. (R.A., p. 16).

James Moore was honorably discharged from the United States Army in 1958 and, thus, qualifies for veteran status in seeking employment with the State of Illinois. Since 1978 he has repeatedly sought employment with the State, particularly for available positions within the Department of Corrections, but has been denied all positions due to his political affiliation. When Petitioner Moore approached his State Representative who was a Republican about getting a job, he received the following letter:

(Letterhead Of)

GENERAL ASSEMBLY
STATE OF ILLINOIS
ROBERT C. WINCHESTER
STATE REPRESENTATIVE – 59th DISTRICT

James W. Moore, Sr. August 15, 1980
Route 3, Box 278
Golconda, Illinois 62938

Dear Mr. Moore:

In response to your July letter requesting employment with the State of Illinois, please be advised that there are over 1,100 applications on file at the Vienna Correctional Center. Of those, 450 have been strongly recommended by the precinct committeemen within the Republican organization. This represents requests for employment from the 12 counties in the 59th legislative district. . . .

. . .

I would suggest that you make contact with your precinct committeeman and your Republican County Chairman. You will have to receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office.

Sincerely,

/s/ Bob
Robert C. "Bob" Winchester
State Representative

RCW/jam

James Moore could not obtain the Republican County Chairman's signature due to his political affiliation. Jobs for which he had applied, and for which he was qualified, were filled with persons less qualified, but who were affiliated with the favored political party. (R.A., pp. 16-17, 25-26).

The system that denied the Petitioners and Cross-Respondents these important aspects of employment is relatively simple. There are more than 60,000 persons employed in the fifty departments, boards and commissions under the jurisdiction of the Governor of Illinois. Each year more than 5,000 of those positions are filled by promotion, transfer or hiring as a result of resignations, deaths, retirements, expansion of job positions, changes in job classifications and reorganizations. (R.A., p. 6).

On November 12, 1980, Respondent Thompson issued an Executive Order which formalized the employment system of his administration. (R.A., p. 6). It reads:

(Letterhead Of)

STATE OF [Seal] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER Number 5 — (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. All hiring is frozen. There will be no exceptions to this order without my express permission after submission of appropriate requests to my office. (R.A., p. 23).

Thereafter, Respondent Thompson delegated to employees in his office the power to implement this Order. Those employees came to be known as the "Governor's Office of Personnel." Actual implementation of that Order means that no position can be filled, either by promotion, transfer, recall from lay-off or hire, without the permission of

that office. The decision to fill a particular position is based upon political factors, namely, the contribution of money to the Republican Party and the support of that party and its candidates. Those who are politically favored are promoted, transferred, recalled from layoff or hired. Those who are not so favored are not promoted, transferred, recalled from layoff or hired.

The Governor's Office of Personnel uses employees in each department, known as liaisons, to keep the Office advised as to positions available or about to be made available. The liaison also facilitates the actual promotion, transfer, recall from lay-off or hire of those approved by the Governor's Office of Personnel. (R.A., p. 8).

In deciding whether to fill a particular position with a particular person, the Governor's Office of Personnel reviews the person's primary voting record, the support that person has given to Republican candidates and the financial contributions made by that person to the Republican Party and Republican candidates. The voting records of relatives, their support of candidates and their financial contributions also play a role in determining whether the person will be given a position. (R.A., p. 7).

In making the review, the Office uses the local county Republican Party organizations (there are 102 counties in Illinois). The form obtained by Petitioner Rutan, reprinted *supra*, is used by the local county organizations. After review and verification of the information on the form, the county Republican Party organizations decide whether to forward a recommendation supporting the person to the Governor's Office of Personnel. (R.A., p. 7).

If the home county organization does not recommend the person, nothing is forwarded to the Governor's Office. Once a recommendation is received by the Governor's Office of Personnel, that Office then decides whether the

person will be promoted, transferred, recalled from lay-off or hired.

The cost of operating this system of employment is two million dollars of taxpayers money—money paid by Independents, Democrats and Republicans not of the same political persuasion as the incumbent administration, as well as, by supporters of that administration. (R.A., pp. 12, 20). While this tax money is collected in a non-partisan fashion, the system it supports is designed to interfere with the free functioning of the electoral process. (R.A., p. 18).

The Plaintiffs are direct victims of this employment system.

The District Court dismissed all claims.

The Seventh Circuit, *en banc*, remanded the claims of Ricky Standefer and Dan O'Brien for a determination on the facts as to whether their situations were of the type considered inherently coercive and violative of the First Amendment in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). Ricky Standefer and Dan O'Brien did not join in the Petition for Certiorari, but are before this Court on the granting of the Cross Petition for Certiorari.

The Seventh Circuit held that the other employment actions were constitutional unless they constituted constructive discharge. The Court further held the federal courts were not open to James Moore's claim, thus, giving *de facto* constitutional protection to all systems of hiring based upon political beliefs and affiliation.

Judges Ripple and Cudahy dissented as to the standard of constructive discharge imposed on the Rutan and Taylor claims. Judge Ripple further dissented as to Moore's claim urging the matter be remanded for development of the factual record as to the particular employment system in this case.

SUMMARY OF ARGUMENT

Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and political affiliations. By Executive Order and implementation of an employment system, the Respondents have done what could not be done by statute: namely, limit promotions, transfers, recalls from lay-off and employment itself to those who are politically favored. The inherent unconstitutionality of the system is apparent, for the Respondents could not post a vacant position listing as a qualification a $500.00 contribution to a particular political party or a particular political candidate. But, *sub silencio*, that is what has happened in Illinois.

Petitioners and Cross-Respondents have not supported the Republican Party and its candidates either by financial "contributions" or "volunteer" work. Nor have they voted in the Republican primary. Just as Petitioners and Cross-Respondents have the right to support political candidates and associate with a political party, Petitioners and Cross-Respondents also have the right under the First Amendment to the United States Constitution not to support a particular political party or its candidates and the right to refrain from voting in a particular party primary.

As a result of the exercise of those First Amendment rights, Respondents denied Petitioners Rutan and Taylor promotions, Petitioner Taylor a transfer, Cross-Respondents Standefer and O'Brien recall from lay-off, and Petitioner Moore a job itself. These acts are coercive in nature and directly interfere with Petitioners' and Cross-Respondents' First Amendment rights.

When First Amendment rights are at stake, this Court has not drawn any distinction between an employee's rights and an applicant's rights.

There is no overriding or vital state interest that justifies this interference with Petitioners' and Cross-Respondents' First Amendment rights. Allowing the incumbent administration to appoint its policy makers, who have the ability to discharge subordinates if they do not carry out the policy, insures effective and efficient government. In fact, the interest of the state would have been better served by the granting of the benefits these Petitioners and Cross-Respondents sought, for Petitioners and Cross-Respondents were more qualified than the politically favored persons who received the benefits.

The employment system in this case does not strengthen the two party system, but rather is intended to strengthen one party by coercing persons to vote in that party's primary, not out of choice, to contribute money to candidates whose views they do not support, and to work for a political party with whom they do not wish to associate. But that is the price that must be paid if those persons are to be promoted, transferred, recalled from lay-off or hired.

This Court should not relegate First Amendment rights in the employment context to a position inferior to other constitutional rights, particularly employment rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The employment system at issue in this case means that Democrats, Independents and Republicans holding political views different from the incumbent administration need not apply for promotion, transfer, recall from lay-off or hire, for they simply will not receive those benefits of employment. That violates the First Amendment right of freedom of association.

ARGUMENT

I. Introduction.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), this Court recognized:

> that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office or that no federal employee shall attend Mass or take any active part in missionary work.

This Court applied that principle to state legislatures in *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Illinois General Assembly could not constitutionally enact a law providing that no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed, promoted or transferred by the state or a law providing that only those favored by the Republican Party could be employed, promoted or transferred by the State.

But that is exactly what has happened by Executive Order and implementation of an employment system that limits jobs, promotions, recall from lay-off and transfers to those politically favored by the incumbent admininstration. What the state could not do lawfully by statute the state has done indirectly by Executive Order and practice. Regardless of the method, the impact on First Amendment rights is the same. Both are unconstitutional.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court said:

> . . . The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. 427 U.S. at 361.

At the outset, Petitioners and Cross-Respondents recognize that an incumbent administration should have the ability to fire and hire policy makers of their political persuasion where political affiliation is a legitimate factor to be considered. *Branti v. Finkel*, 445 U.S. 507 (1980). The Petitioners and Cross-Respondents simply do not fall into that category.

II. Traditional Analysis Of First Amendment Public Employment Cases.

In those cases raising First Amendment issues, this Court has repeatedly used the following analysis:

1. All persons have the right to freedom of speech and freedom of association as guaranteed by the First Amendment of the United States Constitution.

2. If the state is to interfere with those First Amendment rights it must have a compelling or overriding state interest.

3. If the state has such an interest, the interference with the right must be clearly defined in the least restrictive terms possible. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Eu v. San Francisco County Democratic Central Committee*, ____ U.S. ____, 109 S.Ct. 1013 (1989).

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government interest by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

Throughout this litigation, the Petitioners and Cross-Respondents have framed their position and argument

within this traditional analysis, but Respondents have failed to do so.

III. The Conduct Of The Petitioners And Cross-Respondents Is Protected By The First Amendment To The United States Constitution.

Long ago this Court recognized that public employees, just as private citizens, enjoy the First Amendment rights of freedom of speech and freedom of association. *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Rankin v. McPherson*, 483 U.S. 387 (1987).

Basic to the exercise of First Amendment rights is the right to support a particular political party which espouses particular ideas and the right to support particular candidates for public office. *Elrod v. Burns*, 427 U.S. 347 (1976); *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972); *Tashjian v. Republican Party of Connecticut*, 477 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, ___ U.S. ___, 109 S.Ct. 1013 (1989). Such association is fundamental to our democratic way of life.

This Court has also recognized the right protected by the First Amendment to refrain from supporting a particular party or candidate. The holdings in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), make it abundantly clear that silence or not supporting a particular party or candidate is protected by the First Amendment.

In striking down that provision of an agency shop agreement which required a teacher to contribute support to an ideological cause he might oppose, this Court in *Abood* after citing *Buckley v. Valeo*, 424 U.S. 1 (1976), said:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. *For at the heart of the First Amendment is the notice that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.* See *Elrod v. Burns, supra*, 427 U.S. at 356 357, 95 S.Ct. at 2681-82; *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542; *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628. 431 U.S. at 234-35.
>
> (emphasis added).

The Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and association.

The Respondents have never contested the fact that the conduct of the Plaintiffs falls within the protection of the First Amendment to the United States Constitution.

IV. The Denial Of Promotion, Transfer, Recall From Lay-Off And Employment Itself Interferes With Petitioners' And Cross-Respondents' First Amendment Rights.

A. Public Employees

Because the actions of the Respondents implicate the First Amendment rights of the Petitioners and Cross-Respondents, the standard of review is one of exacting scrutiny. *Elrod v. Burns*, 427 U.S. 347 (1976); *Eu v. San Francisco Democratic Central Committee*, ____ U.S. ____, 109 S.Ct. 1013 (1989).

In *Elrod*, this Court (plurality opinion) rejected beginning the analysis of the patronage system with the judgment of history or the actual operation of the practice but rather held the inquiry began with identification of the constitutional limitations imposed by the system and said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976). *Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.* 427 U.S. at 355-356. (emphasis added).

Those limitations are no different in the instant case. Simply change the words "maintain their jobs" to "obtain a promotion, transfer, recall from lay-off or a job itself." The effect on the individual is the same. People often compromise to obtain what they want, but compromise is not possible in this case. Not only must the Petitioners and Cross-Respondents reject or abandon their beliefs, but they must support that in which they do not believe in order to obtain a promotion, transfer, recall from lay-off or employment. They must vote in the favored party's primary, not by choice. They must work for the election of candidates whose views they do not accept. They must contribute money to support a party with whom they do not wish to associate.

> Patronage, therefore to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis, supra*, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief of public employment on political faith. *Elrod v. Burns*, 427 U.S. at 357.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the petitioner argued that the respondents were not subjected to political coercion, that those employees being displaced simply did not have proper political sponsorship. This Court rejected that argument saying:

> While it would perhaps eliminate the more blatant forms of coercion described in *Elrod, it would not eliminate the coercion of belief* that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job. More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion of both Mr. Justice BRENNAN and Mr. Justice STEWART that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs. 445 U.S. at 516-517. (emphasis added)

In this case, not only is the sponsorship required, the blatant forms of coercion are also present. The coercion in this case is no less than in *Elrod*.

The Respondents have taken the position throughout this litigation that denial of promotion, transfer, recall from lay-off and a job itself does not rise to the level of a constitutional violation.

The Seventh Circuit recognized that failure to transfer or promote *was coercive* but found it "significantly less coercive or disruptive than discharging an employee" (A-25).

In the Seventh Circuit, there are now degrees of coercion or disruption under the First Amendment—some constitutional and some not. Prior to its decision in this case, the Seventh Circuit had an outstanding record in protecting public employees' First Amendment rights.[3] The Seventh Circuit decision in this case is, indeed, an aberration.

The Seventh Circuit's approach amounts to distinction without meaning and emasculates this Court's holdings in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980). Anyone who has supervised an employee knows there are two forms of punishment—each intended to bring behavior into desired conformity. Denying an employee a raise by denying promotion can have a far more devastating effect than a two day suspension. Yet under the Seventh Circuit's view only the latter would be actionable. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Both are forms of punishment. The key factor is that both are intended to bring behavior into conformity with desired conduct: financial "contributions" to and "volunteer" support of the favored party and affiliation with that party by voting in that party's primary. The employment system in this case is every bit as coercive as that in *Elrod*—even more so because these are civil service jobs.

The Seventh Circuit tried to distinguish this case from its prior decisions by claiming the denial of promotion and transfer was not directed against Petitioners Rutan and Taylor, but was incidental to favoring other persons. This

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[3] *Mueller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (written reprimand); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (transfer); *Knapp v. Whitaker, et al.*, 757 F.2d 826 (7th Cir. 1985) (transfer); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (transfer); *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) (denial of promotion; summary judgment on the facts for defendants affirmed but underlying premise was that the complaint stated a cause of action); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (harassment after public employee had run for public office and made statements on public issues and had supported another candidate after she lost the primary).

Court rejected that argument in *Branti v. Finkel*, 445 U.S. 507 (1980). The Third Circuit followed *Branti* in *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987) saying:

> The defendants also assert that *Elrod* and *Branti* should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters. The problem with this assertion, however, is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252-53, 82 L.Ed.2d 462 (1984).

and further concluded:

> Although *Pickering*, *Elrod*, and *Branti* each involved dismissals from employment, the rationale of each dealt with the constitutionality of action adversely affecting an interest in employment in retaliation for an exercise of first amendment rights. As we read those cases, *the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech.* "The first amendment is implicated whenever a government employee is disciplined for his speech." *Waters v. Chaffin*, 684 F.2d 833, 837 n. 9 (11th Cir. 1982) (demotion and transfer). See *Robb v. City of Philadelphia*, 733 F.2d 286, 295 (3d Cir. 1984) (transfer and refusal to promote); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983) (suspension). 823 F.2d at 731 (emphasis added).

See also, *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

The firings of the Plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976), and in *Branti v. Finkel*, 445 U.S. 507 (1980),

can also be viewed as incidental to the employers' desire to hire their own people. That did not pass constitutional muster then and should not now.

The denial of promotion, transfer, and recall from layoff are forms of coercion.

The denial of a promotion to Petitioner Cynthia Rutan directly impacts the amount of money she will take home each month. Assume the promotion results in a $200.00 per month salary increase and could lead to further promotions. That could mean the difference between her child attending college or not. Increased salary directly affects other employment benefits: pension, Social Security benefits, disability payments, Worker's Compensation's benefits and life insurance coverage (through the state) for they are based on percentages of salary.

Also important is the effect on state government. The denial of her promotion affects the quality of government, for Cynthia Rutan was more qualified than those actually promoted. The same is true as to the denial of Petitioner Franklin Taylor's promotion.

The denial of the geographical transfer to Petitioner Franklin Taylor means countless hours a year on the road, away from family and other pursuits, driving to and from work and there is also the monetary impact: the cost of mileage and the wear and tear on his vehicle.

The coercion of the system is especially apparent in the case of Cross-Respondent Dan O'Brien. Close to the end of the two years in which he had the right to be recalled, the business administrator of the mental health center in which Dan O'Brien had worked told O'Brien he was going to be recalled. Two months later, the superintendent of that center told O'Brien the Governor's Office of Personnel rejected his recall. Subsequently, Dan O'Brien sub-

mitted to the system. He did what he had to do to get the support of Joe Sapp, the Republican County Chairman in Logan County. When he obtained that support, he was hired by the Department of Corrections. However, due to the rejection of his recall by the Governor's Office of Personnel, he still lost his twelve years of seniority and other benefits he had gained while with the Department of Mental Health and Developmental Disabilities.

This employment system is a phenomenal violation of the First Amendment. The State of Illinois is a major employer. With the exception of Standefer's position, these are civil service jobs, not the temporary type of position before this Court in *Elrod*. Thousands of Illinois citizens are being subjected to coercion—to change their political beliefs and demonstrate that change by acts of support of that in which they do not believe—in order to get promoted or transferred or hired.

The Respondents' acts toward these public employees are coercive and strike at the very heart of the First Amendment. They were intended to force the Petitioners and Cross-Respondents to vote in the Republican primary and to give money and other support to the Republican Party. The Respondents have denied Cynthia Rutan, Franklin Taylor, Ricky Standefer and Dan O'Brien important benefits of employment due to their political beliefs and affiliations.

B. Applicant For Public Employment

This Court has already extended full First Amendment protection to applicants. This Court has made no distinction between an employee and an applicant when First Amendment rights are at stake.

The explanation for not making any distinction between "applicant" First Amendment rights and "employee" First Amendment rights is found in *Perry v. Sinderman*, 408 U.S. 593 (1972), where the teacher may or may not have had re-employment rights. But assuming that teacher Sinderman had no employment rights the Court held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra*, unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398, 404-405, 83 S.Ct. 1790, 1794-1795, 10 L.Ed.2d 965, and welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627, n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600; *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754; *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Shelton v. Tucker*, 364 U.S. 479, 485-486, 81 S.Ct. 247, 250-251, 5 L.Ed.2d 231; *Torcaso v. Watkins*, 367 U.S. 488, 495-496, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982; *Cafeteria & Restaurant Workers*

v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288, 82 S.Ct. 275, 281, 7 L.Ed.2d 285; *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Elfbrandt v. Russell*, 384 U.S. 11, 17, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629; *Whitehall v. Elkins*, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228; *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811. We have applied the principles regardless of the public employee's contractual or other claim to a job. 408 U.S. at 597.

In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Torcaso applied to become a notary public. He was rejected at the application stage because of his refusal to sign an oath due to religious beliefs. The highest court in Maryland had affirmed the denial of Torcaso's notary commission holding he was not compelled to believe or disbelieve; he simply could not hold public office unless he signed the oath. This Court struck down the oath requirement saying:

> *The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.* This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. 367 U.S. at 495-496. (emphasis added).

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court struck down a loyalty oath requirement that applied to both applicants for employment and employees. The statutory and regulatory oath requirements sought "to *bar* employment," 385 U.S. at 609, for association which could not be prohibited consistent with the First Amendment.

The holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), provided the precedent for this Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976). The plurality opinion relied upon two grounds: 1) the impact of patronage upon freedom of belief and association; 2) the imposition of an unconstitutional condition on the receipt of a public benefit as prohibited by *Perry v. Sinderman*, 408 U.S. 593 (1972). The concurring opinion did not comment upon the first ground but relied heavily upon the second.

Branti v. Finkel, 445 U.S. 507 (1980), can clearly be viewed as a hiring case for the whole purpose of the contemplated employment actions was to make way to hire those with the proper political sponsorship. If political hiring is constitutional, then *Branti* was decided incorrectly.

This Court also addressed the question of political hiring in *Branti* by way of footnote, 14, 445 U.S. at 519 and said:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:
>
> "Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations emerging into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. *By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?* No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 457 F. Supp., at 1293, n. 13 (emphasis added).

It was clear from the comments of the dissenters in *Elrod* and in *Branti* that the Court believed that no real

distinction exists between the constitutional rights of those seeking employment and those already employed.

This Court most recently addressed an applicant's rights in the First Amendment context in *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987), and in *Frazee v. Illinois Dept. of Employment Security*,-____ U.S. _ _ _, 109 S.Ct. 1514 (1989). In *Hobbie*, the State of Florida had denied Hobbie unemployment compensation benefits when she was fired because she refused to work on her Sabbath (she was a Seventh Day Adventist). Citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and quoting *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707 (1981), this Court said:

> *Where the state conditions receipt of an important benefit* upon conduct proscribed by a religious faith, *or where it denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.* 107 S.Ct. at 1049 (emphasis added by the Court).

Certain Courts of Appeal have also refused to draw a distinction between an applicant and an employee.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff applied for forty positions at the Library of Congress. He claimed that he was denied those positions due to his affiliation with the Young Socialist Alliance. The District Court dismissed this claim. The D.C. Circuit reversed, holding:

> The district court's judgment on this claim must be reversed and the claim must be remanded for consideration of whether Clark met his burden of proof under the standard applicable to first amendment-based employment discrimination claims. 750 F.2d at 101.

In *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) the Third Circuit found discharge and hiring comparable:

> In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association. 555 F.2d at 392.

In *Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977), a case remarkably like the present case, the Court held that conditioning the hiring and promotion of persons for county jobs on political campaign contributions to local politicians was plainly unconstitutional. The Court recognized there was no right to public employment but held:

> . . . denial of employment or promotion may not be conditioned on the making of a financial contribution to a political party. 435 F.Supp. at 552.

In *Thorne v. City of El Segundo*, 726 F2d 459 (9th Cir. 1983), the Court held that inquiry into the private, off-duty personal life of an applicant for employment as a police officer violated her rights to privacy as guaranteed by the First Amendment. The Court said:

> A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. 726 F.2d at 469.

Petitioner Moore has been denied public employment due to his political beliefs and his political affiliation. He simply could not get the signature *required* to get a job, that of the Republican County Chairman. Should he now do what Cross-Respondent O'Brien was compelled to do—"volunteer' to work for the politically favored candidates, "contribute" money to the politically favored party and vote in that party's primary? Should the State be allowed

to require such a debasement and degradation of one's beliefs and ideals as a prerequisite to employment?

The implications of the Seventh Circuit's ruling goes far beyond Petitioner Moore. By outright dismissal of Moore's claim, the Seventh Circuit has said there is no system of political hiring that can ever be unconstitutional.

This effectively bars thousands from pursuing their chosen profession or employment for so many fields are exclusively or predominantly public employment: law enforcement, education, conservation, corrections, mental health, public aid, regulation of professions and regulation of certain industries. In certain geographical areas of Illinois, public employment is the major source of employment. For persons trained in these professions one cannot easily find a non-public job nor is it easy, in several parts of the state, to find a job in the private sector which pays a living wage.

Under these circumstances, conditioning employment itself upon adherence to certain political beliefs and affiliation is highly coercive and intended to bring behavior into desired conformity. It violates Petitioner Moore's First Amendment rights.

V. The Respondents Have Not Put Forth Any Compelling Or Overriding State Interest To Justify Infringement Of The Petitioners' And Cross-Respondents' First Amendment Rights.

At no time in this litigation have the Respondents put forth *any* state interest, let alone a compelling or overriding state interest, to justify the interference with the exercise of First Amendment rights.

The Seventh Circuit Court of Appeals suggested possible state interests when it referred to Justice Powell's

dissent in *Branti v. Finkel*, 445 U.S. 507 (1980). Those suggested state interests were rejected in both *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Ironically the dissent of Mr. Justice Powell in *Elrod* was based on the assumption that patronage hiring played a "limited role . . . in most government employment." 427 U.S. at 388. That assumption does not apply in the instant case. No position is filled by promotion, transfer, recall from lay-off or hire without the permission of the Governor's Office of Personnel.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court recognized the history of patronage, but rejected the proposition that patronage promoted efficient and effective government saying:

> At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those basis in fact exist. 427 U.S. at 366.

The exemption of policy making positions certainly gives the incumbent administration the ability to govern as it wishes. Those exempt persons set the policy. Subordinate employees who do not carry out the set policy can be fired for insubordination. But it serves no state interest that a road equipment operator (Petitioner Taylor) or a garage worker (Cross-Respondent Standefer) or a dietary manager (Cross-Respondent O'Brien) be required to support a particular political party. All that serves the state is that they perform their assigned duties well.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court noted that the state interest standard was not met:

> to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. 445 U.S. at 517, fn. 12.

In the instant case, efficient and effective government would have been served by the promotion of Petitioners Rutan and Taylor for they were more qualified than those persons actually promoted. State interests would have been served by the Department of Mental Health and Developmental Disabilities not losing Cross-Respondent O'Brien's twelve years of experience in food service.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court also rejected the argument that the patronage system strengthened the two party political system saying:

> And most indisputably, as we recognized at the outset, *patronage is a very effective inpediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.* Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC v. Letter Carriers, supra*, and *United Public Workers v. Mitchell, supra*, the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights. 427 U.S. at 369-370. (emphasis added)

In this case the employment system strengthens the incumbent party and uses two million dollars of tax money to do it.

This Court in *Branti v. Finkel*, 445 U.S. 507 (1980) further noted that:

> Government funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government. 445 U.S. at 517, fn. 12.

But that is exactly what has happened in this case.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court cautioned against confusing partisan interests with state interests. Partisan loyalty must not be confused with governmental loyalty. The Plaintiffs can be patriots loyal to the concept of effective and efficient government to serve the people of Illinois. That patriotism is not to be confused with the requirement of total loyalty to one political party or one set of political candidates. Partisan loyalty and governmental loyalty merging into one entity from the basis of the totalitarian state.

How ironic that in the instant case the Respondents have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the Respondents require a loyalty oath in order to be promoted, transferred, recalled from lay-off or hired. (See Sangamon County Republican Party promotion application form, p. 7 *supra*). The Petitioners and Cross-Respondents must vote in the Republican primary. They must contribute to the party and they must work for the endorsed party candidates. This is not just the saying of a few words under oath. Affirmative acts must be performed—acts that run counter to the Petitioners' and Cross-Respondents' political beliefs. The consequences of not conforming is adverse employment action.

The State of Illinois has expressed its state interest when it enacted into law a merit system of employment. All employment transactions in the instant case, with the

exception of Cross-Respondent Standefer, fall under the civil service system established by the Personnel Code, *Ill. Rev. Stat.*, Ch. 127, Sec. 63b101. The very purpose of that civil service system is set forth in the statute itself:

> 63b102. Purpose
>
> Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, *based on merit principles and scientific methods*. (emphasis added).

"Merit principles" of personnel administration has been defined and interpreted by Illinois Courts in the following manner:

> Such principles are few and relatively well known. Cardinal among them is that the purpose of civil service laws is to provide a method which ensures *competent service* for governmental bodies, *free of the spoils system. Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579, 315 N.E.2d 573, 578 (1st Dist., 1974). (emphasis added)

See also *Hacker v. Myers*, 33 Ill. App. 2d 322, 179 N.E. 2d 404 (1st Dist. 1961); *Burke v. Civil Service Commission*, 41 Ill. App. 2d 446, 190 N.E. 2d 841 (3rd Dist. 1963). The state has identified its interests in a merit employment system free of the spoils system. State interests articulated through the enactment of statute simply do not include the insidious patronage system operated by Respondents.

The patronage employment system serves the interests of the Republican Party and its candidates, but the interests of the Republican Party and its candidates are not the interests of the State. There are no overriding or compelling state interests to justify the interference with First Amendment rights that exist in this case. Because of this Petitioners and Cross-Respondents need not go on to the

third aspect of traditional First Amendment case analysis, namely, that the interference with the right must be *clearly* defined in the least restrictive terms possible. But Petitioners and Cross-Respondents do note it is not clearly defined as to how much of a "contribution" will get Cynthia Rutan the desired promotion or how much "volunteer" work will get Franklin Taylor the transfer to his resident county. If there is an overriding state interest then the Respondents must clearly articulate what is required to obtain a promotion, a transfer, recall from lay-off or a job. This focus demonstrates the inherent unconstitutionality of the system. Imagine the Department of Corrections posting a vacant position and including in the posting that a contribution of five hundred dollars to a particular party is necessary to get the job, or, in the alternative, one hundred hours of work canvassing the precinct in the last primary election. But, *sub silencio*, that is what is happening in Illinois.

VI. This Court Must Not Relegate First Amendment Rights To A Position Vastly Inferior To Rights Guaranteed Under Other Amendments To The United States Constitution.

Circuit Courts of Appeal have never applied a constructive discharge standard to a person denied an employment benefit on the basis of race or sex in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Riordan v. Kempiners, et al.*, 831 F.2d 690 (7th Cir. 1987) (salary difference of state employees—sex); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (harassment and retaliation of a fire department employee—race).

The Courts of Appeal have repeatedly recognized a cause of action brought under 42 *United States Code* 1983

for failure to hire due to race or sex. In *Van Houdnos v. Evans, et al.*, 807 F.2d 648 (7th Cir. 1986), the Seventh Circuit reversed a directed verdict for defendant and reinstated a jury verdict for the plaintiff who was denied a position at the Illinois State Museum due to her sex. In *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir. 1988), the Court reversed the District Court's summary judgment for the defendant as to certain individual applicants' claims that they were denied employment due to their race. In *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), the Court reversed the dismissal of the claims of certain applicants for public employment and the dismissal of claims of public employees denied promotion due to race.

There is no rational basis to relegate the right to freedom of speech and freedom of association to an inferior position vis-a-vis the right to be free from discrimination based upon race or sex in employment matters. Decades before blacks were considered persons and over a hundred years before women were granted the right to vote, this nation established the right to freedom of speech and freedom of association. Those rights form the foundation of representative democracy. Those rights must not be relegated to a position inferior to Fourteenth Amendment.

This Court has repeatedly struck down other state limitations on the granting of benefits when those limitations violate other constitutional provisions. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court struck down a one year residency requirement for the obtaining of state welfare benefits holding that if the purpose of the law was to chill assertion of constitutional rights it was patently unconstitutional. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court struck down a New Mexico statute denying a tax exemption to Vietnam veterans who resided in that state after May 8, 1976, on

the grounds the state may not favor established residents ("its own") over new residents. This Court also struck down a New York veterans' preference hiring statute when that state limited the preference to veterans who had served in the armed forces while a resident of that state. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

With all due respect for these other rights guaranteed by the Amendments to the Constitution, the First Amendment rights form the underpinning of our system of government. In this year, the two hundredth anniversary of the Bill of Rights, this Court should not relegate First Amendment rights to a position inferior to those other rights.

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1956).

The whole concept of freedom of association negates the coupling of denial of an employment benefit with disapproval of political beliefs and affiliation or with coercion to change those beliefs and association.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a

cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

Respectfully submitted,

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QUESTIONS PRESENTED

Plaintiffs allege that, from among a pool of qualified applicants for hiring, promotions, transfers and rehiring, the State Officials have favored those who are Republicans or Republican supporters, or friends or relatives of Republicans, or sponsored by Republicans or friends of the Governor, or sponsored by members of the Illinois legislature who are deemed to be friends or supporters of the Governor.

1. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they hire nonpolicymaking public employees?

2. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they grant desired promotions or transfers to existing nonpolicymaking public employees, or rehire former nonpolicymaking employees who have been laid off?

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Robb v. City of Philadelphia, 733 F.2d 286 (3d Cir. 1984)	38
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Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents,

and

MARK FRECH, *et al.*,

Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS/CROSS-PETITIONERS

STATEMENT OF THE CASE

A. The Complaint

On July 1, 1985 plaintiffs Cynthia Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James Moore (collectively, "plaintiffs") filed this purported class action against the Republican Party of Illinois and of each county of Illinois, two Republican Party officials, Governor James R. Thompson and seven former or current state government officials.[1] Plaintiffs allege that the State Officials and the other defendants created an employment system in which certain personnel decisions are "substantially motivated" by considerations of friendship and politics (R.A. 7, ¶ 11f),[2] so that political and financial supporters of the Republican Party "are favored in regard to State of Illinois employment." (R.A. 2, ¶ 1.)

[1] This brief is submitted on behalf of James R. Thompson, Mark Frech, Greg Baise, William Fleischli, Randy Hawkins, Kevin Wright, James Reilly and Lynn Quigley (collectively, "the State Officials"). The Republican Party of Illinois and of each county of Illinois, Don W. Adams, and Irvin Smith are also Respondents/Cross-Petitioners in this proceeding. Counsel for those parties have indicated that they intend to adopt the Brief On The Merits filed by the State Officials.

[2] A copy of the complaint has been reproduced in the Respondents' Appendix ("R.A."), attached to the State Respondents' Brief In Opposition, at R.A. 1-32. The opinions of the District Court and the Seventh Circuit will be cited herein by their placement in the Petitioners' Appendix ("Pet. App."), attached to the Petition for Writ of Certiorari. The District Court's opinion also is reported at 641 F. Supp. 249. The decision of the Seventh Circuit *en banc* is reported at 868 F.2d 943. Plaintiffs' brief on the merits will be cited herein (Pl. Br.). In addition, Independent Voters of Illinois, *et al.* ("IVI"), the National Education Association, the AFL-CIO, and the North Carolina Professional Firefighters Association have submitted amicus briefs in support of plaintiffs' claims. Those briefs will be cited herein (IVI Br.), (NEA Br.), (AFL Br.) and (NCF Br.), respectively.

Plaintiffs allege that as part of these considerations in the employment process, the State Officials make use of voting records and also take into account an individual's "financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." (R.A. 7, ¶ 11g.) The alleged purpose and effect of defendants' conduct is to "limit State employment and the benefits of State employment to those who are politically favored . . . and thereby provide the Governor, the Republican Party and Republican candidates for political office with political campaign contributors and to discourage opposition to the Governor and the Republican Party in elections." (R.A. 8, ¶ 11k.)

The considerations which the State Officials allegedly take into account in the employment process are not limited to partisan support for the Republican Party. Instead, they encompass a variety of factors which extend beyond partisan political affiliation. Plaintiffs allege that (R.A. 7, ¶ 11f):

> "In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the 'Governor's Office of Personnel' are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson."

Thus, plaintiffs do not allege in their complaint a strict partisan patronage system for making decisions relating to hiring, promoting, transferring and rehiring public employees. Rather, they allege that these decisions are substantially affected by consideration of the applicants' or employees' (1) affiliation with or financial support of the Republican Party,

or (2) friendship with a Republican, or (3) family relationship with a Republican, or (4) sponsorship by a Republican, or (5) friendship with Governor Thompson, or (6) support of Governor Thompson, or (7) sponsorship by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Governor Thompson, or (8) some combination of these factors. (See R.A. 7, ¶ 11f.) Under the alleged system complained of, the favored applicant for hiring, promotion, transfer or rehiring may have no direct connection whatever to the Republican Party (*e.g.*, a friend of a Democratic member of the Illinois legislature who is a friend of the Governor).

Further, plaintiffs do not allege in their complaint that those who were selected instead of plaintiffs for hiring, promotion, transfer and rehiring were unqualified for the positions they obtained. Nor do plaintiffs claim that the successful candidates failed to meet the requirements of the Illinois Personnel Code ("the Code"). *Ill. Rev. Stat.*, ch. 127, ¶ 63b101 *et seq.* (1985).

The specific allegations of the complaint regarding each plaintiff are as follows:

Plaintiff Moore alleges that he unsuccessfully sought employment with the state from 1978 through mid-1985. (R.A. 17, ¶ 23b.) During that seven-year period, two relatives of Republican Party officials and one person allegedly affiliated with the Republican Party were "hired by State government in positions for which Plaintiff Moore was qualified." (R.A. 17, ¶ 23e.) Moore alleges that he received a letter from a state representative suggesting that he contact local officials of the Republican Party (R.A. 17, ¶ 23c; R.A. 25-26), and that when he did so, he was told that he needed to get two signatures to obtain a job. (R.A. 17, ¶ 23d.) Moore does not allege that the candidates who were hired instead of Moore were unqualified, or that he was more qualified than those other candidates.

Plaintiff Rutan alleges that since the Fall of 1981, she has applied for promotions to supervisory positions within her department. (R.A. 14, ¶ 19b.) Rutan does not allege that these positions were awarded to unqualified employees, but rather that the positions she sought were filled by persons who were less qualified than she but favored by the Governor's Office of Personnel. (R.A. 14, ¶ 19g.) Rutan claims that in 1983 she obtained a copy of a form allegedly used by defendants in promoting employees. (R.A. 14, ¶ 19e; R.A. 24.) The form asks qualified applicants if they are willing to work for or contribute money to the Republican Party. (R.A. 24.) The form also asks applicants for promotions to indicate the name, date, and grade of the test taken under the Code which qualifies them for the desired promotion. (*Id.*)

Plaintiff Taylor alleges that he failed to obtain a promotion which he claims was awarded to another state employee "who was less qualified and had less seniority" but who had the support and approval of the Republican Party. (R.A. 15, ¶ 20c.) Taylor does not allege that the person who received the promotion was unqualified. Taylor also claims that he did not receive a desired transfer to another county because the transfer was opposed by local Republican Party officials. (R.A. 15, ¶ 20f.) Taylor does not allege that another employee (whether more, equally or less qualified) received the transfer which he desired, or that any other employee was transferred to any other county.

Plaintiff Standefer alleges that he was hired in a temporary position in the Spring of 1984 and, along with five other employees, was laid off in November 1984. (R.A. 15, ¶ 21a, b.) Standefer does not challenge the propriety of the layoff. Standefer claims that the other five individuals "had the support of the Republican Party" and received new offers for state employment, but that Standefer—who allegedly once had voted in the Democratic primary at some unstated time in the past—did not receive another job offer. (R.A. 15, ¶ 21c-e.) However, Standefer does not allege that the other

five employees held temporary positions, as he did, which limited his term of employment to a period of six months. *See Ill. Rev. Stat.* ch. 127, ¶ 63b108b.9 (1985). Nor does Standefer claim that the persons who were offered other jobs were unqualified for the state jobs, or that he was more qualified than they for the jobs.

Plaintiff O'Brien alleges that he was laid off from a state job in April 1983, after 12 years of state employment. (R.A. 15-16, ¶ 22a, b.) He does not challenge the layoff; nor does he claim that another person was hired to replace him. O'Brien claims that he was not recalled to his previous position, and that several months later—after he obtained the support of the Chairman of the Republican Party of Logan County—he received another state job with less seniority and salary. (R.A. 16, ¶ 22d, e, g.)

Plaintiffs do not claim that they have been discharged, demoted, harassed or punished in any way for their political beliefs or affiliation. Rutan and Taylor do not allege that their titles, responsibilities, salaries or employment status were in any way affected when they failed to obtain desired promotions or transfers. Neither Standefer nor O'Brien contends that he was laid off due to his political affiliation or nonaffiliation. Plaintiffs do not allege that they were coerced to work for, vote for, or contribute money to the Republican Party or its candidates.

Nonetheless, plaintiffs claim that the consideration of friendship and "politics" as alleged in the complaint violates their rights to freedom of speech and association. (R.A. 17, ¶ 24a.) As relief from this allegedly unconstitutional employment system, plaintiffs seek $1.02 billion in compensatory and punitive damages and the imposition of a receivership "to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor." (R.A. 22, ¶ 12.)

B. Proceedings in the District Court

The District Court dismissed the complaint in its entirety for failure to state a claim. (R. 73; R. 77, at 33-35.) *See* Pet. App. C-1. The District Court held that plaintiffs failed to state a claim under the First Amendment because their vague and inconclusive allegations that defendants used "political considerations" in hiring, promoting, transferring and rehiring state employees is distinct from the situation presented in *Elrod v. Burns*, 427 U.S. 347 (1976), in which this Court prohibited the dismissal of public employees based solely on their political affiliation. Pet. App. C-5; C-11.

The District Court determined that this Court's prior decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), did not govern plaintiffs' claims because "any incidental effect that might flow from the use of political considerations in [the challenged] employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech." Pet. App. C-13. The District Court also held that plaintiffs' allegations that other candidates received the jobs or promotions which they themselves desired did not constitute "punitive personnel actions in retaliation for their exercise of protected First Amendment speech." Pet. App. C-10.[3]

[3] The District Court's dismissal of plaintiffs' complaint for failure to state a claim rendered it unnecessary to address the State Officials' claim of qualified immunity. The Seventh Circuit requested the District Court to address this claim on remand. Pet. App. A-30 n.6. Even if this Court determines that one or more of the plaintiffs have stated a claim, the requests for monetary relief must be dismissed under the doctrine of qualified immunity because the "rights" which plaintiffs assert in this case will have been established by this Court in this proceeding; they previously have not been recognized much less clearly and consistently established by the courts. *See Mitchell v. Forsyth*, 472 U.S. 511, 530-31 (1985); *Davis v. Scherer*, 468 U.S. 183, 191 (1984). In the alternative, the Court can order the District Court to consider this issue in the event a remand is necessary.

C. Proceedings in the United States Court of Appeals for the Seventh Circuit

By a divided vote, a panel of the Seventh Circuit affirmed the District Court's dismissal of plaintiff Moore's hiring claim, holding that the failure to obtain a particular position does not sufficiently affect First Amendment freedoms to state a constitutional claim. Pet. App. B-23-24. The panel remanded the claims of plaintiffs Rutan, Taylor, Standefer and O'Brien ("the employees") for a determination whether their failure to be promoted, transferred or rehired was "the substantial equivalent of dismissal." *Id* at B-23.[4]

After a rehearing *en banc*, the Seventh Circuit reinstated the panel majority's opinion virtually unchanged. Pet. App.

[4] The panel affirmed, without dissent, the District Court's dismissal on standing grounds of plaintiffs' allegations, as voters, that the alleged employment system deprived them of "equal access and effectiveness of elections." Pet. App. B-30. Following its prior decision in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988), and the decision of the District of Columbia Circuit in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the Seventh Circuit concluded that "the injury asserted in the complaint is not fairly traceable to the challenged action." Pet. App. B-31. The Seventh Circuit's subsequent *en banc* decision unanimously adopted this holding. Pet. App. A-32.

Plaintiffs have not sought review of the Seventh Circuit's decision on this issue, which is fully consistent both with this Court's precedents on standing and with decisions of other courts of appeals. Although plaintiffs' claim as voters is no longer a part of this case, amici IVI devote substantial portions of their brief to the argument that the employment practices alleged in the complaint deny "the public's rights to a free and fair political and electoral process." (IVI Br. 7; *see id.* at 14-18.) This argument is not relevant to the issues before the Court; it also is manifestly incorrect in light of this Court's decisions on standing and the Seventh Circuit's decision in *Shakman*, which IVI fails to cite in its brief. IVI's failure to cite *Shakman* hardly could have been an oversight; Mr. Shakman, one of the plaintiffs in that litigation, is himself a party to IVI's amicus brief.

A-1. Following its prior decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and the decision of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the Court of Appeals determined that the burdens which the alleged employment practices impose on the First Amendment rights of job applicants do not rise to the level of a constitutional deprivation. Pet. App. A-24. Drawing on the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984), the Court reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." Pet. App. A-24. Furthermore, "[a]ny burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim." *Id.*

The *en banc* Court recognized that, with regard to the claims of the employees, it was undetermined "whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment." Pet. App. A-13. To resolve the constitutionality of the promotion, transfer, and rehiring claims alleged in the complaint, the Court of Appeals adopted the "substantial equivalent of dismissal" test enunciated in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). Pet. App. A-17.

Although the Seventh Circuit adopted the *Delong* analysis, it distinguished the allegations in this case from the claims of political retaliation that were at issue in *Delong*. This case does not involve allegations of adverse employment actions—like the involuntary transfer and reassignment in *Delong*—designed to punish employees for the exercise of free speech. Here, plaintiffs Rutan, Taylor, Standefer and O'Brien complain that other employees received more favorable treatment from their public employer. (R.A. 2, ¶ 1.)

In remanding this case for a determination of the employees' claims, the Court of Appeals expressed substantial doubt

that they could meet the *Delong* standard on the basis of the allegations stated in the complaint. Pet. App. A-25, 27-28, 29. Distinguishing those cases in which employees were punished for the exercise of protected speech, the Court emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Id.* at A-23 n.4.

One judge dissented as to the dismissal of plaintiff Moore's hiring claim. *Id.* at A-33. Two judges dissented from the majority's adoption of the "substantial equivalent of dismissal" standard to govern the employees' claims. *Id.*[5]

SUMMARY OF ARGUMENT

Plaintiffs apparently recognize that the factual allegations actually made in their complaint do not raise a constitutional issue under the doctrine of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Thus, in their brief, plaintiffs abandon those allegations, and they argue instead that this case involves the type of strict partisan political patronage system that was involved in *Elrod*. This argument directly conflicts with the allegations of plaintiffs' complaint.

The complaint alleges that certain employment decisions are "substantially motivated" by a myriad of considerations which include politics, family relations and friendships. This system obviously can cut across party lines. Plaintiffs now assert in their brief that the State Officials have used a strict political litmus test to exclude non-Republicans based solely

[5] Throughout this brief, we refer to Mr. Moore's claim as the "hiring claim." We frequently refer to the promotion, transfer and rehire claims of plaintiffs Rutan, Taylor, Standefer and O'Brien as "the employees' claims."

on party affiliation. (*Compare* R.A. 7, ¶ 11f *with* Pl. Br. 16.) Distorting the allegations in their complaint, plaintiffs assert in their brief that job seekers *must* vote in the Republican primary, contribute money to the Republican Party and volunteer to work for the Republican Party even to be considered for a job. (Pl. Br. 21.) Plaintiffs now proclaim—with no factual basis in their complaint—that all State of Illinois employees must take an oath of loyalty to the Republican Party in order to be hired, promoted, transferred or rehired. (Pl. Br. 35.)

Plaintiffs and their amici effectively ask this Court to pass on the constitutionality of a hypothetical "employment system" that bears little resemblance to the allegations of the complaint. At the time of the District Court's original dismissal of the complaint, plaintiffs declined to file an amended complaint, but instead elected to stand on the adequacy of their initial pleading. As a result, the legal significance of plaintiffs' claims must be determined by reference to the well-pleaded facts alleged in the complaint. Their attempt to raise claims in this Court which were not pleaded, litigated or decided in the Courts below should be rejected.

Part I of this brief discusses plaintiff Moore's hiring claim. We demonstrate that the First and Fourteenth Amendments do not prohibit elected state and local officials from using the kinds of considerations involved here when they hire public employees from a pool of qualified applicants. In both *Elrod* and *Branti*, the Court reviewed a strict partisan employment system which commanded the discharge of existing employees who were performing satisfactorily on the sole ground that they belonged to the "wrong" political party. *Elrod*, 427 U.S. at 349 (plurality opinion); *Branti*, 445 U.S. at 508. As a result of the strict nature of the system, the Court in *Elrod* found substantial support for its ruling in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and other decisions invalidating "loyalty oaths" as a condition for continued public employment. *See Elrod*, 427 U.S. at 357-

58 (plurality opinion). In *Elrod*, as in *Keyishian*, the public employer did not weigh relevant factors or even consider an employee's performance; the plaintiffs were discharged or threatened with discharge solely as a result of their political beliefs or affiliation. No such system is involved in this case.

In Part I A, we demonstrate that, contrary to the arguments of plaintiffs and their amici, the complaint does *not* allege a strict partisan political patronage system designed to reward Republicans and only Republicans with jobs. Plaintiffs have not alleged, for example, that Democrats, applicants recommended by Democratic office-holders, or applicants who have no political affiliation, are precluded from obtaining a state job based solely on their party affiliation or lack thereof. Thus, neither the hypothetical posited by the Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), nor the "loyalty oath" cases cited in *Elrod*, are relevant here.

In Part I B, we demonstrate that the principal concern underlying *Elrod*—that automatic partisan firing has a chilling effect on the First Amendment rights of the affected employees—is not implicated by the hiring decisions involved here. *Elrod*'s limitation on the most extreme manifestation of traditional patronage practice—the dismissal or threat of dismissal of existing employees—was based on the concern that employees will be discouraged from expressing their true political beliefs if it might cost them their jobs. *Elrod*, 427 U.S. at 359. Here, in contrast, the state's failure to hire an applicant such as Mr. Moore does not impose a comparable burden on First Amendment freedoms, and accordingly does not raise a constitutional issue.

Part II discusses plaintiffs' promotion, transfer and rehiring claims. In Part II A, we demonstrate that there is no cognizable claim for a failure to be promoted, transferred or rehired under the circumstances alleged in the complaint. Here, as in the hiring context, any limited burdens imposed on the First Amendment rights of the affected employees by

the use of considerations of friendship and politics among qualified employees do not give rise to a constitutional claim.

In addition, as we show in Part II B, there is a significant difference between plaintiffs' allegations that certain favorable employment decisions are "substantially motivated" by such considerations (R.A. 7, ¶ 11f), and cases involving the imposition of punitive employment sanctions in direct retaliation for political belief or expression. See Pet. App. at A-23 n.4; *Id.* at C-10-11, 13. There is no allegation in this case that plaintiffs Rutan, Taylor, Standefer or O'Brien have been reprimanded, demoted or in any way punished in retaliation for their political beliefs. The employees complain only that other qualified employees have been favored with promotions, transfers or rehire decisions which plaintiffs hoped to obtain. No strict partisan political qualification is involved. The First Amendment does not require a ban on friendship and political considerations under these circumstances.

In Part III, we demonstrate that prudential considerations weigh strongly against extending the reach of *Elrod* to the dramatically different employment practices alleged here. Interference by federal courts with the operations of state and local government will be increased significantly if *Elrod* is extended to cover all prospective employees who are not hired and all employees who fail to obtain a desired promotion, transfer or rehire. Such a sweeping rule of constitutional law would require federal courts to serve as "platonic guardians" over the personnel practices of fifty states and thousands of local government offices.

Plaintiffs and their amici suggest that such judicial oversight not only is proper, but is essential to ensure that elected officials do not favor certain qualified employees on the basis of friendship or "politics," just as they cannot discriminate on the basis of race or religion. However, unlike racial or religious discrimination, there is no constitutional principle which prohibits friendship, "politics" and other "connections" from being considered in public employment.

These types of considerations traditionally have been, and remain today, an integral part of our political and social landscape. Thus, the decisions of this Court and constitutional prohibitions outlawing discrimination on the basis of race and religion do not support plaintiffs' claims in this case.

In the end, the First Amendment does not preclude elected state and local officials from considering friendship and "politics" in the employment contexts raised in this case. The Court's narrow ruling in *Elrod* should not be expanded in the manner and to the extreme degree urged by plaintiffs.

ARGUMENT

I.

THE HIRING PRACTICES ALLEGED IN THE COMPLAINT ARE WELL WITHIN CONSTITUTIONAL LIMITS.

In *Elrod v. Burns*, this Court held that the First and Fourteenth Amendments prohibit the dismissal or threat of dismissal of nonpolicymaking employees based solely on party affiliation. *Elrod*, 427 U.S. at 375 (concurring opinion). In *Branti v. Finkel*, this Court reaffirmed that political affiliation cannot be the sole basis for depriving some incumbent public employees of continued employment. *Branti*, 445 U.S. at 516.

This case presents the Court with an issue not decided in those cases: whether the First and Fourteenth Amendments to the Constitution prohibit elected state and local officials from taking into account friendship and political connections at the opposite end of the employment spectrum—in the hiring of public employees.[6] We demonstrate

[6] Plaintiffs and their amici suggest that this issue is foreclosed by the Court's decisions in *Elrod* and *Branti*. (Pl. Br. 29-30; NEA Br. 16; IVI Br. 21; AFL Br. 19-20; NCF Br. 7, 8.) *Elrod* and *Branti* themselves expressly refute this suggestion. Although Justice Brennan's plurality opinion in *Elrod* recognized that "political patronage comprises a broad range of activities," including placing loyal supporters in government jobs, he emphasized that the only issue before the Court was "the constitutionality of dismissing public employees for partisan reasons." 427 U.S at 353 (Brennan, J., plurality opinion). Justice Stewart's narrow concurring opinion, joined by Justice Blackmun, confirms that the limited reach of *Elrod* does not extend to the employment practices alleged in this case. *Id.* at 374-75 (Stewart, J., concurring). Likewise, in *Branti*, the Court expressly stated that the only practice at issue was the firing of public employees solely for partisan reasons. 445 U.S. at 513 n.7. The Court therefore declined to address the defendant's contention that the hiring of employees in the public defender's office warranted a different result. *Id.*

below that plaintiff Moore's hiring claim properly was dismissed because the type of hiring practices alleged and their effect, if any, on applicants like Moore each distinguish *Elrod* and require a different result.

A. The *Elrod* Principle Does Not Preclude Consideration Of The Friendships And Politics Of Qualified Applicants In The Hiring Process.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court addressed for the first time the constitutionality of one aspect of "political patronage." In *Elrod*, three employees in the Cook County Sheriff's Office had been fired and a fourth was in imminent danger of being fired "solely because they did not support and were not members of the Democratic Party, and had failed to obtain the sponsorship of one of its leaders." *Id.* at 351. The plaintiffs contended that this practice deprived them of rights guaranteed under the First and Fourteenth Amendments. *Id.* at 350. A closely divided Court held that nonpolicymaking, nonconfidential employees cannot be discharged or threatened with discharge solely because of their political affiliation or nonaffiliation. *Id.* at 375 (Stewart, J., concurring).[7]

In *Elrod*, it was undisputed that the plaintiffs were discharged *solely* because of their political affiliation or nonaffiliation. 427 U.S. at 350, 351, 375. The nature of the "political considerations" at issue in *Elrod* was simple, straightforward and unforgiving: employees either affiliated

[7] The Court reaffirmed *Elrod* in *Branti v. Finkel*, 445 U.S. 507 (1980), holding that an assistant public defender who is satisfactorily performing his job cannot be discharged solely because of his political beliefs. *Id.* at 517. Reformulating the policymaker exception recognized in *Elrod*, the Court found that a public employee's political affiliation or beliefs "cannot be the sole basis for depriving him of continued employment," *id.* at 516, unless the government agency can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

with or obtained the sponsorship of the Democratic Party or lost their jobs. *Id.* at 351. In light of the strict party requirement in that case, the plurality found substantial support for its ruling in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183 (1952); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *See Elrod*, 427 U.S. at 357-58 (plurality opinion).[8]

The considerations challenged here are fundamentally different from the strict partisan practice condemned in *Elrod*. Here, there is no allegation that the State Officials' employment decisions are based solely on political affiliation. *See* Pet. App. C-11. Unlike *Elrod*, where the dismissals were dictated solely by reference to party affiliation, the considerations alleged in the complaint are not absolutely determinative of the hiring process and are not limited to affiliation with the Republican Party. (*See* R.A. 7, ¶ 11f.)

Thus, plaintiff Moore has not alleged that job recommendations are a prerequisite to be hired for a state job; nor are such recommendations alleged to be the exclusive province of the Republican Party. Instead, hiring decisions are alleged to be "substantially motivated" by considerations of friendship, politics and other personal relationships. These considerations include whether the applicant or employee is a relative or friend of a Republican (which presumably includes Democrats, Independents and persons not connected to any party). Thus, plaintiff Moore alleges that two of the three people hired instead of him were relatives of Republicans (R.A. 17, ¶ 23e); he does not allege that they were Republicans, or were not Democrats or Independents.

[8] In both *Wieman* and *Keyishian*, the Court recognized that political association could not, by itself, require or threaten the dismissal of a public employee. *See Elrod*, 427 U.S. at 358-59. In *Mitchell*, the Court posited a strict hypothetical singling out certain groups for adverse treatment solely on the basis of race, religion or political party affiliation.

Likewise, under the allegations of the complaint, these considerations include sponsorship by any member of the Illinois General Assembly (without regard to party affiliation) who is "deemed to be a friend or supporter of Defendant Thompson." (R.A. 7, ¶ 11f.) Plaintiffs do not allege in their complaint—nor could they—that Governor Thompson's "friends" and "supporters" are limited to members of the Republican Party.

Moreover, unlike *Elrod*, where employees were fired without any regard for their performance on the job, the employment practices alleged in the complaint are entirely consistent with the mandate of the Illinois Personnel Code.[9] Plaintiff Moore does not allege that the successful candidates for the job he sought were unqualified within the meaning of the Code, or even that he was more qualified than the applicants who were hired by the state.

[9] The Code, which establishes certain procedures to determine qualifications for state jobs, does not dictate which person or persons will be awarded a job (or transfer or promotion) from a pool of qualified candidates. The Code ensures only that candidates who are considered for positions have passed the appropriate examination. For example, in the hiring context, the Code provides for "open competitive examinations to test the relative fitness of applicants for the respective positions." *Ill. Rev. Stat.* ch. 127, ¶ 63b108b.1 (1985). The Code requires that successful candidates (*i.e.*, candidates who have passed the requisite examination) be placed on eligibility lists in order of their respective performance on the examination. *Id.* at ¶ 63b108b.3. The Code operates in similar fashion regarding promotions, transfers, and rehires. *E.g.*, *Id. at* ¶¶ 63b108b.2, 108b.11, 108b.12. State agencies may hire applicants from the appropriate eligibility list. *Id.* at ¶ 63b108b.5. Having established the prerequisites for qualification, the Code goes no further, affording state agencies the discretion to hire employees from among the Code-qualified candidates. Plaintiffs do not allege that defendants have hired, promoted, transferred or rehired any person not on the appropriate eligibility list.

The alleged "patronage system" which Moore attacks is nothing like the strict partisan test at issue in *Elrod*, or the loyalty oaths which were struck down in *Wieman* and *Keyishian*. Plaintiff Moore claims only that other qualified applicants were hired by the state based, in part, on a variety of factors that include family, friendships, politics and other connections. *(See* R.A. 17, ¶ 23e.) These hiring practices, which comport with the state Personnel Code, are not proscribed by the First Amendment.

The Court of Appeals for the Sixth Circuit upheld the consideration of politics, friendship and family relations in hiring public employees in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986). In *Avery*, the plaintiff alleged that her application for employment was not considered because she was unconnected with the defendants' "network" of friends, relatives or "friends or relatives of political allies." *Id.* at 234. The evidence in *Avery* demonstrated that the "network" had a strongly partisan character. During a period of nearly eight years, only 10 of the 432 persons hired by the defendants were Democrats. *Id.* at 235. One of the defendants in *Avery* explained this preference in plainly partisan terms: " ' [A]ll things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected.' " *Id.*

Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Emphasizing that the hiring decision turned on a variety of factors, the Court distinguished the authorities upon which plaintiff Moore relies (*id.* at 237):

> "There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes—finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government."

Here, as in *Avery*, plaintiff Moore has alleged that decisions to hire state employees are based, in part, on a nonexclusive network of recommendations from a variety of sources. (R.A. 7, ¶ 11f.) Indeed, the allegations in this case portray an employment system far less restrictive than the system upheld by the Sixth Circuit in *Avery*.

In apparent recognition that there is no basis to extend the limited holding of *Elrod* to the dramatically different hiring practices alleged here, plaintiff Moore grossly mischaracterizes the nature of the alleged "patronage system." In the brief on the merits, plaintiff Moore claims that the State Officials have constructed an employment system in which "no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed" by the State. (Pl. Br. 16.) That is not alleged anywhere in the complaint, nor could it be alleged consistent with Federal Rule of Civil Procedure 11. To the contrary, under the allegations of paragraph 11f of the complaint (R.A. 7), the challenged hiring system permits the hiring of, among others: (1) a Democratic friend of a member of the Illinois legislature who is a friend of Governor Thompson, (2) an

Independent friend or relative of a Republican, or (3) an apolitical friend of the Governor.

Elsewhere in the brief, plaintiff Moore argues that in order to get a job, he must vote in the Republican Party primary, work for the election of Republican candidates and contribute money to the Republican Party. (Pl. Br. 21.) This also is not alleged anywhere in the complaint. Plaintiff Moore also asserts in his brief that the State Officials "have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the [State Officials] require a loyalty oath in order to be . . . hired." (Pl. Br. 35.) This is rhetoric made from whole cloth; it is, as shown above, inconsistent with the allegations of the complaint.

By recasting the allegations of the complaint in this manner, plaintiff Moore apparently hopes to avail himself of this Court's decisions in *Branti*, *Elrod*, and *Keyishian*.[10] A careful examination of the complaint confirms that *Elrod* and the "loyalty oath" cases have no application here. As both courts below properly determined, there is a substantial difference between a strict employment system that excludes applicants on the basis of their beliefs, and plaintiff Moore's complaint that other qualified candidates were hired for the position he desired based, in part, on a panoply of considerations which are not limited to political belief. Pet. App. A-23 n.4; Pet. App. C-13. The kind of hiring system

[10] Plaintiff Moore is joined in the rewriting of the complaint by three of his amici, who take similar liberties in mischaracterizing the allegations in the complaint. *See, e.g.*, NEA Br. 4 (omitting any mention of the non-partisan components of the considerations allegedly used in the employment process); IVI Br. 3 (falsely asserting that non-Republicans are "excluded" from being hired "if they do not have the partisan support of the Republican Party officials"); NCF Br. 2 (erroneously stating that "[t]he pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions").

alleged here does not offend the letter or logic of this Court's ruling in *Elrod*.

B. The Burdens Imposed On The First Amendment Rights Of Applicants Who Fail To Obtain A Job Are Not Sufficient To State A Constitutional Claim.

The hiring practices alleged in the complaint are not only less partisan than the firings prohibited in *Elrod*, they also do not impose comparable burdens on the constitutional rights of affected applicants like Moore. In an opinion written by Justice Brennan, the three-Justice plurality in *Elrod* found that patronage practice runs afoul of the Constitution "to the extent it compels or restrains belief and association." 427 U.S. at 357. The plurality reasoned that dismissal or the threat of dismissal from existing employment "unquestionably inhibits protected belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359.

Because patronage dismissals "severely restrict political belief and association" (*id.* at 372), and represent a "severe encroachment on First Amendment freedoms" (*id.* at 373), the *Elrod* plurality considered whether there was adequate justification for this "unquestionable" effect. The plurality found that the interests proffered failed to justify the wholesale firings at issue in that case, and that patronage dismissals were not "the least restrictive alternative" to promote the democratic process. *Id.* at 369. Thus, the plurality concluded that the practice of wholesale firings based solely on partisan political reasons was prohibited by the First and Fourteenth Amendments. *Id.* at 373.

However, the *Elrod* plurality also recognized that a ban on all partisan political firings would undercut representative government by obstructing a new administration's implementation of its own policies. *Id.* at 367. For this reason, the plurality declined to go so far as to ban all such firings, and instead concluded that "[l]imiting patronage dismissals to

policymaking positions is sufficient to achieve this governmental end." *Id.*

The analysis employed by the plurality in *Elrod*—which focused on the burdens imposed on the constitutional rights of the affected employees—requires a different result in the hiring context at issue here. In this case, both the District Court and the Court of Appeals determined that any "chilling effect" on disappointed applicants who fail to get a particular job does not give rise to a constitutional claim. Pet. App. A-24; Pet. App. C-5. This determination correctly interprets the *Elrod* principle, and is consistent with more recent decisions of this Court examining the effects that various employment practices have on applicants and employees.[11]

[11] Two of plaintiffs' amici appear to concede that under *Elrod*, this Court must determine, as a threshold matter, whether the hiring practices alleged "significantly impair" First Amendment freedoms so as to require constitutional scrutiny. *See* IVI Br. 12 n.4 ("For constitutional purposes, the emphasis must be on the effect of the system on freedom of speech and association"); AFL Br. 11 (contending that First Amendment freedoms are "severely burdened" by the employment practices alleged). Relying on *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), plaintiffs and amicus NEA disagree with that approach; they contend that the extent of the burdens imposed on the First Amendment rights of the affected applicants and employees are irrelevant. *See Pl. Br. 22-23; see also* NEA Br. 3 (in balancing the interests of the employee and the state, as an employer, "the relative severity of the employment sanction that has been imposed . . . is not a factor to be weighed").

However, political patronage runs afoul of the Constitution "to the extent it compels or restrains belief and association." *Elrod*, 427 U.S. at 357 (plurality opinion). For this reason, plaintiffs and NEA err by leaping to a discussion of the relevant state interests without determining, at the outset, whether the burdens imposed on First Amendment freedoms are of constitutional magnitude. Their attempt to import the *Connick and Pickering* balancing tests should be rejected. The Court in *Connick* emphasized that in each of the precedents in which *Pickering* is rooted, the government employed the threat of discharge to prevent or "chill" public employees from joining political parties or other associations.

(footnote continued on following page)

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court struck down a school board's policy of affording minority teachers preferential protection from layoffs. Justice Powell's plurality opinion drew a sharp distinction between the effects which affirmative action plans have on incumbent employees and on individuals who seek to be hired. *Id.* at 282. The plurality observed that *"[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."* *Id.* at 282-83 (emphasis added). The plurality explained that "[a] worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do

[11] *continued*
Connick, 461 U.S. at 144-45. In *Pickering* itself, as in *Connick* and more recently in *Rankin v. McPherson*, 483 U.S. 378, 379-80 (1987), this Court reviewed the *discharge* of a public employee in retaliation for the exercise of speech. *Pickering*, 391 U.S. at 574; *Connick*, 461 U.S. at 141. Thus, the effect on First Amendment rights underlying *Elrod* was present in each of those cases.

By contrast, in this case, there is no allegation that an employee has been discharged, threatened with discharge, or punished in retaliation for the exercise of protected speech or association. Plaintiffs here complain that other employees received more favorable treatment from their public employer on the basis of friendship, politics and the like. Neither *Connick* nor *Rankin* supports a departure from the *Elrod* analysis, which requires examination of the competing interests of the government and employee if there is found to be a significant effect on the First Amendment rights of the individual employee. *See Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip. Op. at 13 (1st Cir. December 8, 1989)(*en banc*). *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting) (citation omitted) (" '[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights'; one must 'look closely at the nature of the intrusion . . . to see whether we are presented with a real limitation on First Amendment freedoms.' ")

not." *Id.* at 283.[12] *See also Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 638 (1987) ("denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioners"); *United States v. Paradise*, 480 U.S. 149, 183 (1987) (citation omitted) (" 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still.")

Although *Wygant* involved a challenge under the Equal Protection Clause of the Fourteenth Amendment, the Court's observations as to the burdens imposed on the constitutional rights of the affected teachers are directly relevant to the issue here. *Wygant* reflects the Court's common sense determination that employment practices short of dismissal (or layoff) do not have the severe practical consequences that are attendant to the loss of a job. This determination is entirely consistent with the principle underlying *Elrod*, in which the Court reviewed the challenged firing practice in light of the burdens it imposed on the constitutional rights of the affected employees. This also is the analysis applied by the Seventh Circuit in this case, which held that plaintiff Moore's failure

[12] In a concurring opinion, Justice White suggested agreement with this distinction (id. at 295) (White, J., concurring): "Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks . . . is quite a different matter"). In a dissent joined by Justices Brennan and Blackmun, Justice Marshall similarly characterized the school board's hiring policies as "less severe" than the use of layoffs to increase minority employment. *Id.* at 309. Justice O'Connor expressed no view on the matter. Only Justice Stevens, in his dissenting opinion (*id.* at 319 n.14), rejected this distinction.

to obtain a job was not actionable under the First Amendment.[13]

As this Court has recognized in *Wygant* and other cases, the Seventh Circuit observed that the burden imposed by a failure to obtain a particular position "is much less significant than losing a job." Pet. App. A-18. The Seventh Circuit explained (*id.* at A-19):

> "[A]n applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income."

Finding that use of the considerations alleged in this case fails to have the same effect as did the solely partisan dismissals of existing employees in *Elrod*, the Seventh Circuit

[13] In his brief, plaintiff Moore suggests that as a result of his failure to obtain a state job, he might have to contribute money to or volunteer to work for the Republican Party in alleged derogation of his ideals. (*See* Pl. Br. 31-32.) We previously demonstrated that in contrast to the arguments presented in the brief, the complaint does not allege that such partisan support is required to obtain a job with the state. (*See* pages 9-10, 19-20, *supra*.) Likewise, the complaint does not allege *any* effect on Moore's political views or activities, much less the effect that is suggested in the brief. More importantly, in fashioning a categorical rule of constitutional law, this Court in *Elrod* did not carve out an exception for the hearty employee who would not be deterred from political expression by the threatened loss of a job. So too in this context, the Court should not base its ruling on the hypothetical effects on a hypothetical plaintiff who might abandon his political beliefs if he does not obtain a job with the state.

correctly affirmed the dismissal of the hiring claim without proceeding to the next stage of the constitutional analysis.[14]

The Seventh Circuit's holding that elected officials may consider political factors in hiring public employees also is consistent with *Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985), *aff'd*, 881 F.2d 219 (6th Cir. 1989) (en banc), *cert. pending*, No. 89-5849, and *Avery v. Jennings*, 786 F.2d 233, the only other appellate decisions on this issue.

In *Messer*, two seasonal workers challenged the decision of the Kentucky Department of Parks not to rehire them as seasonal workers. 610 F. Supp. at 180. The plaintiffs claimed that the defendants refused to hire them solely because of their political beliefs and their failure to work for the election of the then-Governor of the State of Kentucky. *Id.* at 181. The District Court, treating the employment decision as a failure to hire, found that *Elrod* and its progeny failed to support the plaintiffs' claims, and dismissed the complaint. *Id.* at 183-84.

On appeal, the Sixth Circuit affirmed dismissal of the complaint, holding that it is not constitutionally impermissi-

[14] The Seventh Circuit's decision on political hiring is consistent with and derives from its prior opinion in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). In *LaFalce*, the Seventh Circuit affirmed the District Court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The *LaFalce* Court reasoned that *Elrod's* prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." *Id.* at 293. In rejecting the plaintiff's claim that unsuccessful contractors would similarly be discouraged, the Court of Appeals found the "extent of the likely interference" with First Amendment rights insufficient to raise constitutional concerns, and the wisdom of a constitutional ruling forbidding the use of political considerations in this context dubious at best. *Id.* at 294. *Accord Horn v. Kean*, 593 F. Supp. 1298 (D.N.J. 1984), *aff'd*, 796 F.2d 668 (3d Cir. 1986) (en banc).

ble "for an elected official to implement a preference for political supporters in government employment where not otherwise controlled by statute." 831 F.2d at 223. The Court in *Messer* emphasized that "[t]here are a number of distinctions, of considerable practical importance, between the first amendment costs of patronage firing of existing workers, and patronage hiring." *Id.* at 222. Among the controlling differences cited by the Court were the minimal burdens that a hiring system imposes on the constitutional rights of the affected applicants.

The Sixth Circuit further explained (*id.* at 223, citation omitted):

> "As noted in *Wygant*, the pain to the individual from a certainty of loss of existing employment is much greater than the loss of some possibility of employment in one of a number of possible employment opportunities. On the other hand, the potential advantage to an effective and vigorous government of choosing sympathetic and enthusiastic employees is much greater than the gain from dismissal of existing employees who are, by explicit hypothesis, performing satisfactorily. . . ."[15]

The Sixth Circuit's *en banc* decision in *Messer* builds upon its earlier decision in *Avery v. Jennings*, *supra*. In

[15] In upholding the hiring practice at issue in that case, the Sixth Circuit in *Messer* went farther than this Court needs to travel in this case. Plaintiff Moore has not alleged that applicants are denied employment with the State of Illinois solely because of their political affiliation. Instead, as we demonstrated in Part I A, *supra*, plaintiff Moore alleges only that the State Officials' hiring practices are "substantially motivated" by a myriad of "political considerations" that are not limited to political affiliation or partisan political matters. Under these circumstances, there is no basis for a constitutional claim. As the First Circuit observed in *Estrada-Adorno v. Gonzalez*, 861 F.2d 304, 305 (1st Cir. 1988) (emphasis in original): "[W]e have found no federal case holding that it violates the federal Constitution to use political criteria for *hiring* state employees, even in circumstances where it might violate the federal [C]onstitution to *dismiss* them for political reasons."

Avery, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Court of Appeals reasoned that "[a]lthough the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation." *Id.* at 236.[16]

[16] In contrast to *Messer* and *Avery*, the cases upon which plaintiff Moore relies did not involve, much less resolve, the hiring claim alleged in this complaint. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff claimed that his existing employment status with the Library of Congress was affected adversely by an FBI investigation "based solely on the exercise of his associational rights resulting in concrete harms to his reputation and employment opportunities." *Id.* at 93.

In *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977), plaintiffs alleged that they were compelled to contribute part of their salaries to the county committee of the Republican Party to obtain a promotion. *Id.* at 550. In contrast to *Cullen*, it was not (and could not have been) alleged in this case that plaintiffs were forced to make financial contributions to the Republican Party. Indeed, while plaintiffs attach to their complaint a questionnaire allegedly used in promotions—not hiring—that seeks information about the willingness of qualified applicants for promotion to contribute time or money to support the Republican Party, it is not alleged that applicants must fill out the questionnaire, perform work, or contribute money to the Republican Party in order to be promoted. (*See* Pet. App. C-2.)

The Third Circuit has acknowledged that its suggestion in *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977), that a state may not condition hiring on political factors, was "pure dicta" and not controlling. *Mazus v. Department of Transportation*, 629 F.2d 870, 873 (3d Cir. 1980). The only other case cited, *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), involved the right to privacy and "appellant's interest in family living arrangements, procreation and marriage." It is simply irrelevant to the issues raised in this case.

In *Elrod*, this Court imposed the first constitutional limit on the historic practice of political patronage. Finding that the partisan dismissal of public employees inhibits First Amendment rights and penalizes their exercise, the Court curtailed—but did not entirely forbid—the practice. *Elrod*, 427 U.S. at 375 (concurring opinion). In subsequent decisions, the Court has recognized that dismissals from employment have a far greater impact on individuals than do other types of employment practices, for example, hiring, in which no vested interests or settled expectations exist.

Based on this analysis, the only courts of appeals to have addressed this issue, including the Seventh Circuit in this case, have found that the difference between losing an existing job and failing to obtain one is substantial, and dispositive for constitutional purposes. Neither *Elrod* nor its progeny justify extension of the ban on patronage firing to the very different hiring practices alleged in the complaint. Because the burdens imposed on the constitutional rights of plaintiff Moore are not comparable to the loss of a job, and because the "political considerations" alleged here differ markedly from the solely partisan firing practice proscribed in *Elrod*, the Seventh Circuit correctly upheld the dismissal of plaintiff Moore's claim.[17]

[17] This Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972), is clearly distinguishable on both of these grounds. In *Perry*, the plaintiff alleged that the college's decision not to retain him (after ten years of employment) was based on his public criticism of the college administration. *Id.* at 595. The Court's analysis was premised on the plaintiff's allegations that the college had a *de facto* tenure program and that he had tenure under that program. *Id.* at 600-01. Thus, the actual holding of the Court (*id.* at 596)—that the plaintiff's lack of a contractual right to reemployment did not, standing alone, defeat his First Amendment claim—is not inconsistent with the Court of Appeals' decision affirming dismissal of the hiring claim here. Even if *Perry* is not considered a strict firing case, which we believe it is, the college's decision clearly disrupted the plaintiff's settled expectations that he would continue in his job. Moreover, the language in *Perry*

(footnote continued on following page)

II.

CONSIDERATION OF FRIENDSHIPS AND POLITICS IN GRANTING FAVORABLE TREATMENT TO QUALIFIED PUBLIC EMPLOYEES DOES NOT STATE A FIRST AMENDMENT CLAIM.

Plaintiffs Rutan, Taylor, Standefer and O'Brien, who admittedly have not been punished in any way because of their political beliefs or activities, nonetheless attempt to state a constitutional claim because they allegedly failed to obtain a promotion, transfer, or rehire as a result of the considerations of friendship and politics described in the complaint. In this case, the Seventh Circuit extended *Elrod* to protect employees from patronage practices short of dismissal "that may, as a practical matter, impose the same burden as outright termination." Pet. App. A-17. The Court of Appeals remanded the employees' claims for a determination whether the particular employment actions complained of were "the substantial equivalent of a dismissal." *Id.* at A-25.

We previously have demonstrated that there is a substantial and constitutionally significant difference between burdens imposed on individuals who are dismissed from existing employment and on applicants who fail to obtain a job. *See* pages 21-29, *supra*. We also have demonstrated that the complaint alleges an employment system that is far less restrictive than the strict partisan system of wholesale firings

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[17] *continued*

upon which plaintiffs principally rely (*id.* at 597), and the cases cited therein, merely reflect the long-established principle that the state may not punish employees solely for the exercise of protected speech. The decision not to retain Mr. Perry was direct punishment for his exercise of speech and thus ran afoul of this principle.

Plaintiff Moore does not and cannot make either allegation critical to *Perry*: he does not claim that he was punished—in any way, directly or indirectly—for exercising his First Amendment rights; nor does he allege that his failure to obtain a job disrupted any settled expectations and thus burdened his First Amendment rights.

prohibited in *Elrod*. See pages 9-10, 19-20, *supra*. In Section A, below, we demonstrate that these factors also require dismissal of the claims of the employees. Plaintiffs Rutan, Taylor, Standefer and O'Brien have not been adversely affected in their employment status by the use of the considerations alleged in the complaint.

In Section B, we demonstrate that the employees' claims in this case properly cannot be equated with cases involving the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. The chilling effect underlying *Elrod* simply does not exist in the absence of punitive sanctions, or some other employment practice which adversely affects the terms and conditions of an employee's job. Thus, the Seventh Circuit correctly observed that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4. The Court of Appeals erred, however, in failing to give full effect to its observation. The allegations of the employees do not give rise to a constitutional claim, and were correctly dismissed by the District Court.

A. The Alleged Denials Of Promotion, Transfer And Rehire Do Not Affect First Amendment Rights Sufficiently To Raise A Constitutional Issue.

This Court's ruling in *Elrod* was premised on the finding that political firings represent a "severe encroachment on First Amendment freedoms." *Elrod*, 427 U.S. at 373 (plurality opinion). Because the severe employment sanctions proscribed in that case inhibited protected belief and association and penalized their exercise, the plurality found a constitutional issue requiring a balance of the competing state interests. *Id.* at 362.

The allegations of the employees in this case are vastly different from the claims presented in *Elrod*. There is no allegation here that any state employee has been discharged,

or threatened with discharge, with the concomitant disruption of settled expectations. There is no allegation that the State Officials employ a strict political test as the sole basis for employment decisions. Rather, the employees here allege that a "substantial" factor in such decisions are an array of considerations which include recommendations from family or friends of Republicans. (R.A. 7, ¶ 11f.) Likewise, there is no allegation here that the employees have been punished for their political beliefs. Rather, it is alleged only that they "did not receive some favorable employment decisions" as an indirect effect of the considerations of friendship, politics and other relationships. Pet. App. A-8, 23 n.4; Pet. App. C-11, 13. The District Court correctly recognized that these distinctions were critical under the *Elrod* analysis, and required the dismissal of all of the employees' claims. Pet. App. C-5.

The Seventh Circuit recognized that promotion, transfer and rehire decisions are "significantly less coercive and disruptive than discharges." Pet. App. A-19. Nonetheless, the Seventh Circuit remanded the employees' claims on the rationale that those claims could raise a constitutional issue if it were demonstrated that the effect of the denial of promotion, transfer or rehire was to "impose the same burden as outright termination." Pet. App. A-17.

A remand for this determination is unnecessary. Plaintiffs Rutan and Taylor do not claim that their failure to be promoted or transferred resulted in the loss of their jobs, or in any way adversely affected the terms of their employment. Nor do Rutan and Taylor claim that they permanently are barred from receiving the promotions or transfers which they sought. Instead, they challenge the decision of the State Officials to promote another qualified employee or to deny a desired transfer, allegedly based, in part, on considerations of politics and/or friendship.

As a matter of law, this failure to obtain a desired promotion or transfer does not disrupt settled expectations

in a manner comparable to a discharge decision. In *Wygant v. Jackson Board of Education*, 476 U.S. at 282-83, this Court recognized that denial of a future employment opportunity is not as intrusive as the loss of a job. In subsequent decisions, the Court has confirmed that the burdens imposed on the rights of existing employees under circumstances similar to those here do not have the same profound effect as a termination of employment.

In *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), a qualified male employee filed suit challenging the defendant's decision, taken pursuant to an affirmative action plan, to promote a qualified woman to the position of road dispatcher, based, in part, on her sex. *Id.* at 619. Upholding the validity of the affirmative action plan, the Court found that the challenged practice did not unduly affect the terms and conditions of the plaintiff's employment. The Court explained (*id.* at 638):

> "[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."

The same can be said of plaintiffs Rutan and Taylor. Plaintiffs Rutan and Taylor had no "firmly rooted" expectation or "absolute entitlement" to the promotions they desired. They continue to work for the State of Illinois "at the same salary and with the same seniority, and remain[ ] eligible for other promotions." *Id.* *Johnson* confirms that failing to receive a promotion does not carry the same practical consequences that are attendant upon a discharge. It also supports the conclusion that *Elrod*, which is premised on a severe encroachment on constitutional rights, does not apply to the

allegations raised here.[18] As a result, the Seventh Circuit should have affirmed the dismissal of the promotion and transfer claims.[19]

A remand also is unnecessary to determine that the rehiring allegations of plaintiffs Standefer and O'Brien do not state a constitutional claim. As the Seventh Circuit recognized, these claims are even "more straightforward" than the promotion and transfer claims. Pet. App. A-27. Plaintiffs Standefer and O'Brien do not allege that their layoffs were in any way motivated by political considerations. Nor do they claim that they had any specific right to recall or rehire.

Based on their own allegations, plaintiffs Standefer and O'Brien stood in the position of new applicants for employment, with no pre-existing right to obtain a job. *See Rice v.*

[18] In *United States v. Paradise*, 480 U.S. 149 (1987), a four-Justice plurality applied the same analysis to uphold a District Court's order that at least 50% of the Alabama state troopers promoted to corporal must be black. In an opinion written by Justice Brennan, the plurality observed (480 U.S. at 182-83, citations omitted): "The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*. . . . Consequently, like a hiring goal, it 'impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.' 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still."

[19] The Sixth Circuit recently reached this result in *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), *cert. pending*, No. 89-761. In *Rice*, the plaintiff alleged that the defendants' consideration of political factors in declining to promote him violated the First Amendment. *Id.* at 719. Upholding the District Court's dismissal of the claim, the Court of Appeals explained (*id.*): "We see no meaningful distinction, in the present context, between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendants' decision not to promote Mr. Rice was the product of precisely the sort of 'preference for political supporters in government employment' that we found constitutionally permissible in *Messer*."

Ohio Department of Transportation, 887 F.2d at 719 (finding no difference, under the First Amendment, between a failure to hire and failure to rehire); *Messer v. Curci*, 881 F.2d at 221 (plaintiffs treated as applicants where they had no continuing employment status under state law and were not employed at the time of the contested decision). As with the hiring claim of plaintiff Moore, any conceivable burden on the First Amendment interests of plaintiffs Standefer and O'Brien as a result of their failure to obtain a position "is much less significant than losing a job." Pet. App. A-18.

Facing an issue far different from the one raised by the complaint in this case, the First Circuit recently held that punitive employment actions short of dismissal that are based solely on political affiliation may state a First Amendment claim only if, *inter alia*, a plaintiff establishes by clear and convincing evidence that "the employer's challenged actions result[ed] in a work situation 'unreasonably inferior' to the norm for the position." *Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip Op. at 18 (1st Cir. December 8, 1989) (en banc). In fashioning this standard, the First Circuit embraced the analysis of the burdens on First Amendment rights required by *Elrod* and applied by the Courts below and by the Sixth Circuit in *Avery* and *Messer*. *See* Slip Op. at 13 (adopting a "categorical cutoff point of severity below which actions simply should not be considered a constitutionally significant burden"). The First Circuit reasoned that not every adverse employment action creates a First Amendment claim (*id.* at 15): "[I]nsubstantial changes in an employee's work conditions and responsibilities, even when politically motivated, either would not reasonably chill the employee's exercise of the right to free p..itical association, or would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest in implementing new policies."

In this case, plaintiffs' "work conditions" have not changed at all. Quite the contrary, the fact that their work

conditions have not changed for the better is the sole basis for their complaint. Thus, while the test in *Agosto* is designed to govern a situation not presented here—the imposition of adverse employment actions based solely upon political affiliation—the First Circuit's recognition that not all such decisions rise to the level of a constitutional deprivation strongly supports dismissal of the employees' claims here.

B. The Employees Were Not Punished For The Exercise Of Protected Belief Or Association.

In contrast to *Elrod*, *Branti* and *Perry*, the principal cases upon which plaintiffs rely, this case does not involve allegations that public employees have been punished for the exercise of protected speech. Plaintiffs Rutan, Taylor, Standefer and O'Brien assert only that other qualified employees received jobs, promotions, or transfers which they themselves desired. (*E.g.* R.A. 19, ¶ 19g.) This distinction was critical to the Seventh Circuit, which emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4.

The principal concern underlying *Elrod*—preventing elected officials from using discharge or the threat of discharge to chill the exercise of protected belief and association by public employees—is not implicated by the use of the kinds of considerations involved in this case. In contrast to the directly punitive nature of the discharges curtailed in *Elrod* (*i.e.*, employees were fired solely if they failed to join the Democratic Party), the employees in this case complain that other qualified candidates were favored because of political or personal connections.

There is no claim in this case that plaintiffs were reprimanded, harassed or punished for political belief. Nor is there any allegation that the state employees who were promoted or rehired failed to perform their responsibilities, or to render necessary service, to the state. There is a significant difference

between an employment system which uses a strict political test "designed to call attention to political differences and punish those who differ," and a system like that alleged here, which may favor certain employees by taking into account many factors, including recommendations from family, friends and political allies. Pet. App. A-23 n.4; *Avery*, 786 F.2d at 236.

The employees (and NEA) incorrectly rely on a line of decisions—including prior decisions of the Seventh Circuit—which involved the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. Plaintiffs are wrong in asserting that the Seventh Circuit's decision in the case is "an aberration," and abandons that Court's "outstanding record in protecting public employees' First Amendment Rights." (Pl. Br. 22-23.) In each of the decisions upon which the employees rely (Pl. Br. 23), the plaintiffs suffered punitive employment actions in direct retaliation for protected expression.[20]

Here, in contrast, there is no allegation that the employees have been demoted, transferred, harassed, reprimanded or punished in any way for their political beliefs. The distinction drawn by the Seventh Circuit in this case is a

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[20] *E.g.*, *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert denied*, 474 U.S. 803 (1985) (teacher given negative evaluations, removed as athletic coach and transferred as a result of speech on matter of public concern); *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983) (former FBI agent involuntarily transferred and ultimately discharged after he alleged that other bureau personnel had engaged in wrongful conduct); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (plaintiff subjected to a pattern of harassment and ridicule in retaliation for her campaign for public office); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (teacher involuntarily transferred in retaliation for expressing a complaint on school policy); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (police officer reprimanded for violating rule prohibiting employees from engaging in discussion "derogatory to the department").

meaningful one, as it demonstrated more recently in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). In *Pieczynski*, the Court of Appeals upheld a jury verdict in favor of an employee who had been subjected to a pattern of harassment because of her political alliance with an opponent of the then-Mayor of Chicago. Harmonizing the precedents upon which plaintiffs rely, the Court reiterated a critical distinction underlying this case (875 F.2d at 1333-34): "It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees."

In light of this significant difference, *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), and numerous other decisions of the Courts of Appeals, do not control or even address the issue presented by this case. In *Bennis*, the plaintiffs alleged that they had been demoted in retaliation for their support of the Mayor's political opponent. The Third Circuit's opinion in *Bennis*, from which the employees quote at length (Pl. Br. 24), is on its face limited to the imposition of employment sanctions or "any *disciplinary action* for the exercise of permissible free speech." *Id.* at 731 (emphasis added). Here, it is not alleged and cannot seriously be contended that the employees have been disciplined, or that punitive sanctions have been imposed by their public employer.[21]

[21] This critical distinction renders inapposite the other decisions upon which the employees and NEA principally rely. In *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984), the plaintiff was transferred from his position as manager of an outdoor amphitheater to a job as a playground supervisor in retaliation for his union activities and refusal to settle a private lawsuit. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the sole issue before the court was whether a policeman may be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the plaintiff contended that he had been reassigned and transferred for political reasons to a less desirable

(footnote continued on following page)

Each of these cases is distinguished by a central allegation conspicuously absent from the complaint here: the plaintiffs suffered some concrete measure of retaliation (which disrupted their "settled expectations") as a direct result of protected expression. In contrast, this case does not involve allegations of punishment or retribution for political beliefs, but rather, the disappointment of plaintiffs Rutan, Taylor, Standefer and O'Brien that other employees received promotions, transfers or positions which these plaintiffs desired. The employees' disappointment is not actionable under the First Amendment.[22]

[21] *continued*
position in another region of the country. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff alleged that her demands for payment relating to compensatory time and vacation time were denied solely because of her political affiliation. *See also Agosto De Feliciano*, Slip. Op. at 5 (alleging a "drastic change and reduction of [plaintiffs'] duties").

[22] If this Court disagrees, and determines that any of the employees has stated a constitutional claim, we submit—in the alternative—that the Seventh Circuit properly placed the burden on the employee to prove that the failure to obtain a desired promotion, transfer or rehire imposed "the same burden as outright termination." Pet. App. A-17. This test, derived from the Fourth Circuit's decision in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), strikes an appropriate balance for three principal reasons. First, the *Delong* analysis properly accounts for this Court's limited holding in *Elrod* and recognizes that there is serious question as to the wisdom of further extending the reach of that decision. Pet. App. A-17. Second, substantial differences exist between dismissals, which can disrupt settled expectations, and the employment practices alleged in the complaint. *Id.* Third, *Delong* avoids the significant intrusion of federal courts that would result from extending *Elrod* beyond the "substantial equivalent of dismissal," while at the same time providing a remedy for an employee who can demonstrate that his or her failure to obtain a desired promotion, transfer or rehire imposes the same burden on First Amendment rights as would the employee's outright termination. *Id.* at A-17-18.

In contrast to *Delong*, the Third Circuit has extended *Elrod* to prohibit the "imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d at

(footnote continued on following page)

III.

STRONG PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST ATTEMPTING TO PURGE FRIENDSHIP AND POLITICS FROM THE PERSONNEL PRACTICES OF STATE AND LOCAL GOVERNMENTS.

At bottom, plaintiffs' claims in this case are reduced to the accusation that they, rather than some other Code-qualified candidates, should have been hired, promoted, transferred or rehired by the State of Illinois. Strong prudential considerations, as well as the foregoing constitutional principles, confirm that federal courts are not the proper forum to assert these claims.

This Court recognized in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *See also Connick v. Myers*, 461 U.S. at 143 (emphasizing the "common-sense realization that government offices could not function if every employment decision became a constitutional matter"). More recently, in *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court recognized that "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.* at 384 (emphasis in original).

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[*] *continued*

731. We previously demonstrated that the *Bennis* standard does not apply to the allegations stated here because no employees have been disciplined or punished for the exercise of free speech. (*See* pages 36-39, *supra*.) In any event, the Third Circuit's approach is flawed because it represents an unwarranted extension of *Elrod*. Under *Bennis*, it appears that any employee who perceives a slight on the job may state a constitutional claim, without any consideration of the burdens allegedly imposed on his or her constitutional rights.

While each of these admonitions arose in the context of a different constitutional claim, they are particularly apt in this case for two principal reasons: (1) the potential disruption with state and local government which would result from extending *Elrod* to the vastly different practices alleged here; and (2) the absence of any consensus (even among the courts) that friendship and politics should be purged from all contexts of public employment.

Interference with state and local governmental operations will be increased dramatically if *Elrod* is extended to cover all applicants for employment and all existing employees who fail to receive a desired promotion, transfer or rehire. There already are some 60,000 persons employed statewide in Illinois who would be implicated by a decision upholding the claims urged by plaintiffs here. There are thousands more who have applied and will apply for a job with the state. Unlike firing decisions, which are more limited in number, tens of thousands of decisions are made annually concerning hiring, promotion, transfer and rehire. Moreover, unlike the typical discharge situation, in which one employee has been fired, dozens of disappointed applicants might each file a federal suit alleging that they were not hired as a result of politics, friendship and family connections.

Plaintiffs nonetheless ask this Court to proceed down this path, apparently contending that everyday personnel decisions throughout the State of Illinois—and throughout every other state—properly should become a "constitutional matter" supervised by a federal judge. Plaintiffs' position is rigid and absolute: considerations of friendship and politics may *never* be taken into account in the vast majority of personnel decisions made daily by public offices nationwide.

The Seventh Circuit properly declined plaintiffs' invitation to "constitutionalize civil service and then preside over the system." Pet. App. A-22. Rejecting plaintiffs' demand that such considerations be purged from the employment process, the Court of Appeals explained (*id.*):

> "Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals."[23]

The suggestion that federal courts can and should scrutinize the motives of elected state and local officials when they hire, promote and transfer public employees far exceeds this court's narrow ruling in *Elrod*. The principle that public officials cannot fire nonpolicymaking employees solely on the basis of their political affiliation does not support, much less mandate, replacing the Personnel Code adopted by the State of Illinois. The Illinois General Assembly has chosen not to prohibit public officials from preferring one qualified applicant over another on the basis of the considerations alleged in the complaint. To interpret *Elrod* to require such a system unwisely expands the reach of that decision beyond the limits of its history, *see* B. Cardozo, *The Nature of the Judicial Process*, 51 (1921), and imposes unrealistic burdens on federal

[23] *See also Agosto De Feliciano*, Slip Op. at 15 (recognizing substantial government interest, itself founded in the First Amendment, in implementing the policies of the new administration); *Avery*, 786 F.2d at 237 (extending *Elrod* "would require abolition of the hiring systems for office workers in thousands of legislative, executive, and judicial offices across the country . . . [and] the courts would have to constitutionalize a civil service system and oversee its operation"); *LaFalce*, 712 F.2d at 294 ("[A] decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit").

courts to supervise the personnel practices of state and local governments. As Judge Cudahy recognized in his concurring opinion in this case (Pet. App. A-32): "[R]emoving politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts." *See also LaFalce v. Houston*, 712 F.2d at 294 ("To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, other as quixotic, still others as undemocratic, but all as formidable").

These observations have particular force in light of this Court's recognition in *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987), that choosing the "most qualified" employee is not an exact science, but a very human and therefore subjective endeavor (*id.* at 641 n.17, citation omitted):

> " '[I]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.' "

It is undoubtedly true that these prudential considerations, forceful as they are, must yield to constitutional principle in an appropriate case. Here, however, far from facing the moral imperative that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), there is no consensus

that considerations of friendship and politics must be purged from all contexts of public employment.[24]

Thus, the attempt by plaintiffs and their amici to equate the considerations at issue here with discrimination on the basis of race (*see, e.g.*, Pl. Br. 37-39) and religious belief (NEA Br. at 7n.4)) ignores the substantial differences embedded in our history, culture and law between race or religious discrimination and the so-called "political discrimination."

[24] Indeed, the unique and often salutary role of patronage in America politics has led some courts, while compelled to follow the ban on political dismissals, to urge the Court to reconsider *Elrod*. *See, e.g., Loughney v. Hickey*, 635 F.2d 1063, 1071 (3d Cir. 1980) (Aldisert, J., concurring) ("The first amendment is regarded properly as a shield protecting fundamental rights of individuals against government excess or tyranny of the majority. It is quite another thing to use it as a sword to cut out the heart of the basic processes that form our tradition of self-government. In my view, that is exactly what the Supreme Court has done here"); *Whited v. Fields*, 581 F. Supp. 1444, 1452 (W.D. Va. 1984) ("This court disagrees with the *Elrod-Branti* rule both from a standpoint of logic and justice.... We have become a government of the people by the people for the bureaucracy. The only result of the *Elrod* and *Branti* decisions is to simply freeze into public employment people whom the electorate have rejected"); *Visser v. Magnarelli*, 530 F. Supp. 1165, 1175 (N.D.N.Y. 1982) ("It is to be hoped that in light of the inadequate attention paid to patronage's benefits in the Supreme Court's balancing test... the Supreme Court will reconsider the wisdom of its two decisions"). *See also Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (*citing* C. Fish, *The Civil Service and the Patronage*, 156-57 (1905); Sorauf, *Patronage and Party*, 3 Midwest J. Pol. Sci. 115-16 (1959)); *Moeller, The Supreme Court's Quest for Fair Politics*, 1 Const. Comm. 203, 213-17 (1984).

The case before the Court raises only the question of whether the principle of *Elrod* requires a ban on considerations of friendship and politics as a factor in employment decisions other than discharge or discipline. Resolution of this question in favor of the defendants in this case does not involve reconsideration of *Elrod* itself.

The principle of religious freedom is deeply enshrined in our social and political culture, dating back to the arrival of the pilgrims at Plymouth Rock. This principle is embodied in the First Amendment. Our national commitment to racial nondiscrimination is, regrettably, of more recent vintage. It took a Civil War, more amendments to the Constitution, and an evolution of our society to arrive at our present commitment to racial freedom and equality. *See* Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv L. Rev. 1 (1987). *See also* Sullivan, *Book Review*, 32 Am. J. Leg. Hist. 179-82 (1988). But now, that commitment is of the same stature constitutionally as religious freedom.

The same simply does not hold true for "political" discrimination. The political leaders who viewed the First Amendment as a charter of religious liberty saw no tension between that Amendment and the use of politics and friendship in the dispensing of public jobs. The *Elrod* plurality noted that patronage has existed "at least since the Presidency of Thomas Jefferson," 427 U.S. at 353; Justice Powell's dissenting opinion traced the practice back to the administration of George Washington. *Id.* at 378 (Powell, J., dissenting). In that time, the exercise of politics and friendship was raw, and often ignored merit.

Over the years, governments at all levels have adopted merit principles which help ensure that government work is performed by qualified people. However, unlike discrimination based on religion or race, discrimination among qualified applicants on the basis of friendship or politics never has been—and is not now—inconsistent with constitutional doctrine or our conception of American government and society. In the absence of any consensus that the use of such considerations is intrinsically wrong, the Court should resist imposing upon state and local governments a constitutionalized civil service system.

CONCLUSION

For the foregoing reasons, the State Officials respectfully request that this Court affirm in part and reverse in part the decision of the Seventh Circuit, and reinstate the District Court's judgment dismissing the complaint in its entirety.

Respectfully submitted,

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December 18, 1989

Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

INTRODUCTION TO ARGUMENT

Respondents' Brief is as significant for what it does not say as for what it does. Respondents do not, of course, dispute that the basis for the employment decisions in-

volved in this case, party affiliation, political support and voting history, lie at the heart of the First Amendment. Nor do they proffer any state interest to justify basing hiring and other job decisions on those factors. Certainly they do not argue that conditioning jobs on support of an officially favored political party is intended to right a prior constitutional wrong.

Respondents do, however, ignore the well-established precedent set by this Court that the state is prohibited from denying benefits on a basis that infringes constitutionally protected interests.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Contrary to the allegations of the Complaint, Respondents seek to describe the case as if it did not deal with a structured system of hiring based on political affiliation, but on acquaintance and friendship.

Respondents also make the argument that hiring and other job decisions short of discharge are not important enough to warrant application of the First Amendment. Such an argument is plainly contrary to the long established precedent of this Court.

Respondents' suggestion in this regard is, however, far reaching and dangerous. It would allow public officials, even those administering a civil service system, to condition benefits of employment on support of an officially favored party or ideology.

The rule of law Respondents seek from this Court cannot be confined to political affiliation. It extends to belief on fundamental issues of public concern, for such is the

basis of political affiliation. The full implications were well stated by Judge Ripple:

> The majority's holding today will subject countless dedicated government workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clerical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may be passed over for promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in identical fashion. This growing acceptance of infringements on first amendment rights on the ground that the curtailment is minor is indeed a disturbing trend. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way. . . ." *Boyd v. United States*, 116 U.S. 616, 635 (1886). (Petition for Certiorari, pp. B-34-35).

ARGUMENT

I. The Complaint Alleges A Government Employment System By Which Important Benefits Of Employment Are Conditioned On Political Affiliation.

Respondents have sought to distort and trivialize the Complaint as if promotion, transfer, recall from lay-off and hire were not conditioned upon political affiliation. This is precisely the opposite of the allegations of the Complaint:

Introductory Statement

1. This is a class action by Plaintiffs against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in concert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system. (R.A. 2).

The employment system at issue in this case is a structured, formalized system whose "purpose and effect . . . is to limit state employment and the benefits of state employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits. . . ." (para. 11k of Complaint, R.A. 8).

The specific allegations as to Petitioners Rutan and Taylor clearly indicate their promotions were conditioned on politics.

> Plaintiffs, Cynthia Rutan and Franklin Taylor are employees of the State of Illinois . . . who . . . have been and are *denied promotion because they are not deemed politically acceptable or approved by defendants.* (para. 7a, Complaint, R.A. 4). (emphasis added).

Paragraphs 8a and 9a of the Complaint make the same allegations as to denial of Petitioner Taylor's transfer and the failure to recall Cross-Respondents Standefer and O'Brien from lay-off.

Petitioner, James W. Moore . . .

> is a member of and appropriate representative of a class of persons who have been and are desirable of becoming employees of the State of Illinois but *have been denied employment because . . . they are not deemed politically acceptable or approved by Defendants.* (para. 10a, Complaint, R.A. 5-6). (emphasis added).

The Complaint clearly meets the standard set forth in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), in that political considerations are a substantial or motivating factor in making the employment decisions in this case.

Paragraph 11f of the Complaint reads:

> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are *substantially motivated by political considerations. Such political considerations include whether the individual* under consideration is Republican or a relative or friend of a Republican, *is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican,* is a friend or supporter of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson. (R.A. 7). (emphasis added).

Respondents have quoted from this allegation to make it seem as if politics is just one factor along with other factors such as friendship. Plainly the use of the term friend in this context means supporter or contributor. But this Court need not address the meaning of friend, for a fair reading of the Complaint indicates politics is the substantial or motivating factor in granting these important benefits of employment.

These allegations are given additional coloration by the form used by the incumbent party (Exhibit B attached to the Complaint, R.A. 24), the letter from Representative Winchester (Exhibit C attached to the Complaint, R.A. 25-26) and the check of voting records. (para. 11g of Complaint, R.A. 7). It is clear that the very type of political coercion rejected in *Elrod v. Burns*, 427 U.S. 347 (1976), is present in this case as is the very type of sponsorship rejected in *Branti v. Finkel*, 445 U.S. 507 (1980). As was clear in *Branti*, the requirement of political sponsorship alone was sufficient to state a cause of action. Read as a whole under the rules of *Jenkins v. McKeithen*, 395 U.S. 411 (1969), the Complaint alleges that politics were decisive.

The claim is simple: the Petitioners and Cross-Respondents were disqualified from important benefits of employment on impermissible First Amendment grounds.

II. No Constitutional Distinction Can Be Made Between Politically Conditioned Firing And Other So Conditioned Employment Decisions.

Respondents argue that conditioning hiring and other benefits of employment on political affiliation does not significantly burden First Amendment rights, that any such burden is so minimal that such practices do not even require any state interest, let alone a compelling one. This argument is, however, directly contrary to long-standing precedent, which Respondents choose to ignore. It is contrary, as well, to basic common sense.

Respondents' position is that a person's interest in being hired for a state job or in receiving promotions, transfers and recall from lay-off is not important enough to justify application of the Constitution's protection of freedom of

speech or association. This exceptionally dangerous position has been repeatedly rejected by this Court.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), and *Weiman v. Updegraff*, 344 U.S. 183 (1952), this Court stated that no law can deny a government job based on the applicant's being a "Republican, Jew or Negro." In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court held that a state could not condition governmental hiring on an applicant's avoidance of certain views. And in *Torcaso v. Watkins*, 367 U.S. 488 (1961), which was not mentioned by Respondents, this Court held that public *appointment* could not be conditioned on grounds which violate the First Amendment. Even where persons have no "right" to public office, they do have the right:

> to be considered for public service without the burden of invidiously discriminatory disqualifications. The state may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970).

These decisions would have been impossible under Respondents' suggestion that hiring is too trivial a matter to warrant application of the First Amendment.

Respondents' argument would leave the state free to base hiring, promotion, transfer or recall from lay-off on an applicant's religion, race or sex. After all, an applicant for a state job who is rejected because he or she does not hold particular religious views similarly can always fall back on the rest of the job market. This only demonstrates the full implications of Respondents' position.

There is no analytical difference in the application of the First Amendment between hiring, promotion, transfer, recall from lay-off and discharge. Getting a good job, ad-

vancing within one's chosen profession or being recalled from lay-off in a timely fashion are significant to everyone. Conditioning any of these decisions on a person's voting record, party affiliation or political activities significantly burdens the rights of political speech and affiliation, which are at the heart of the Constitution.

Respondents' Brief also virtually ignores the long standing precedent expressed in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), which held that the state:

> may not *deny a benefit* to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could *deny a benefit* to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would *in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. (emphasis added).

That holding followed a long line of prior decisions. It formed the basis for the majority holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Connick v. Myers*, 461 U.S. 138, 142-148 (1983), the principles set forth in those prior decisions were extensively discussed and reaffirmed.

Respondents only reference to *Perry v. Sindermann*, 408 U.S. 593 (1972), a footnote claiming the decision was based on settled expectations, is not only without basis in *Perry*, but was rejected *in haec verba* in *Branti v. Finkel*, 445 U.S. 507, 512, n.6 (1980).

> Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in *Elrod v. Burns*, 427 U.S. 347, 360, n.13; see also *id.* at 380 (Powell, J., dissenting). After *Elrod*, it is clear that *the lack of a reasonable expectation* of continued employment *is not sufficient* to justify a dismissal based solely on an employee's private political beliefs. (emphasis added).

Sindermann's expectations of continued employment (a Fourteenth Amendment claim) was *not* the basis for upholding his First Amendment claim.

Use of political affiliation as a criterion for making the state employment decisions in this case inevitably will have the effect of deterring, or "chilling," the exercise of First Amendment right of association. The very purpose of the system is to coerce affiliation, support and contributions.

The conditioning of benefits in this case can also be viewed from another perspective. No examination of an actual inhibiting effect is necessary when a challenged state action is based on its face on the content of political speech. When the Respondents acted against the Petitioners and Cross-Respondents, they favored certain political affiliations and beliefs and disfavored all others. This they may not do.

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

This holding and that of *Perry v. Sindermann*, 408 U.S. 593 (1972), have been amplified in those cases in which the denial of an important public benefit has been withheld due to the content of the speech or association. Quite

simply, " '[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)) (invalidating a state law that provided a tax benefit only to magazines that published certain types of articles); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984) (overturning a Congressional act that denied federal grants only to those noncommercial broadcasters that engaged in editorializing). *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (time, place and manner restrictions must be justified without reference to the content of the regulated speech).

Such discrimination is equally forbidden when the distinction is made on the basis of political belief and association (or lack thereof), for "[t]he right to associate with the political party of one's choice is an integral part of th[e] basic constitutional freedom [of association]." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

The state cannot discriminate in public employment on the basis of any constitutionally impermissible criteria. That is true whether the benefit be promotion, transfer, recall from lay-off or hire. This is so regardless of the "chilling" effect of the state action, for the state must remain neutral in alloting benefits. The state must not discriminate on the basis of the exercise of the fundamental constitutional right of freedom of association.

Examination of the actual inhibiting effect of a state action is only necessary where a challenged state action is *neutral* on its face, applying equally to all persons. In these instances, the Court's inquiry becomes whether the neutral action nevertheless implicates First Amendment

concerns because of its actual inhibiting effect on the First Amendment activities of certain groups.[1]

This case involves no such neutral practice. The employees here were discriminated against in the matter of employment benefits because they did not have the proper affiliation with the Republican Party. That governmental discrimination violates the First Amendment wholly apart from whatever chilling effect it may have.

III. Respondents' Distinctions Are Without Merit.

A. Denial Of A Benefit Is No Less Unconstitutional Than Negative Action.

Respondents have tried to distinguish denial of a benefit due to exercise of First Amendment rights from "punishment" for exercise of those rights. Petitioners and

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[1] *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (examining whether neutral state election statute has inhibitory burden on associational rights of party); *Anderson v. Celebreeze*, 460 U.S. 780 (1983) (same); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (examining whether neutral state disclosure law will in fact subject minor party to inhibitory threats and harassment); *Buckley v. Valeo*, 424 U.S. 1, 69-74 (1976) (per curiam) (holding that factual showing of infringement on First Amendment associational rights must be shown by minor party in order to challenge neutral state disclosure law); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (appraising neutral state attorney solicitation law to determine its "inhibitory effect upon [First Amendment] rights"); *NAACP v. Alabama ex rel. Patterson*, 356 U.S. 449, 460-63 (1958) (finding that neutral restraint upon the exercise by petitioner's members of their right of freedom of association). *See also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (weighing severity of impact of state compulsory education statute on the free exercise of religion of particular church); *Sherbert v. Verner*, 374 U.S. 398 (1963) (determining that state unemployment benefit law neutral on its face would have an impermissible inhibitory impact on free exercise rights of members of certain church).

Cross-Respondents certainly dispute that narrowing of the term punishment. Withholding a benefit can be every bit as coercive as negative action and may be far more effective in achieving behavior modification.

This Court has recognized Respondents' attempted distinction is without meaning. *Perry v. Sindermann*, 408 U.S. 593 (1972), its predecessors and progeny, dealt with denial of a benefit. In *Elrod v. Burns*, 427 U.S. 347, 359 n. 13 (1976), this Court said:

> Since the government however, may not seek to achieve an unlawful end either directly or indirectly, the inducement afforded by placing conditions on *a benefit* need not be particularly great in order to find that rights have been violated. *Rights are infringed both where the Government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.* (emphasis added).

Respondents also argue that the employment decisions were not made to punish but the effect on Petitioners and Cross-Respondents were incidental to benefitting others. This identical argument was, however, explicitly rejected by this Court in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, the plaintiffs were discharged not to punish them for political views but to facilitate political hiring of their replacements. This was, however, held directly to infringe plaintiffs' own constitutional rights. There is no meaningful difference between not getting a job because one is not politically favored and not getting a job because one is politically disfavored. It is two ways of saying the same thing. See NEA Amicus Brief, pp. 6-7, n. 4.

B. The Holding Of This Court In *Wygant* Does Not Support Respondents' Position.

Respondents argue that hiring based upon political affiliation can be distinguished from political firing on the grounds it is "less intrusive." This is not a fair reading of *Wygant* in the context of this case.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court followed the same three stage jurisprudence analysis as traditionally used in First Amendment cases using the standard of exacting scrutiny. Recognizing that all persons have the right to be free from discrimination based on race, this Court held any racial classification must be justified by a compelling state interest. This Court went on to address *the third stage* in the First Amendment case analysis, namely, whether the means chosen to serve that state interest, if it did exist, were defined in the least restrictive terms possible.

At that third stage, this Court rejected the Board's racially preferential lay-off policy saying the state interest could be met through less restrictive means including racially preferential hiring goals. But this Court recognized that *both* lay-offs and hiring goals were intrusive. This Court would have allowed the lesser of two evils, hiring goals, *only* if second prong of the First Amendment analysis had been met—namely, that such intrusion was necessary to serve a compelling state interest.

The same analysis occurred in each of the cases following *Wygant*. The Court first examined whether the government interests were sufficiently compelling to justify preferential treatment of any kind and then carefully analyzed the "fit" of the preferential treatment plans to the particular interest to be furthered. *United States v. Paradise*, 480 U.S. 149, 166-85 (1987) (plurality opinion);

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 631-40 (1987).

Only in this *last* stage of the analysis did the issue of the degree of injury to the plaintiffs become relevant. And it arose *only* in the context of determining whether those injuries were necessary in order to further the *compelling state interest* of remedying discrimination, *i.e.*, whether the system was the least intrusive method of vindicating that interest.

The distinction between discharge and hiring was made in *Wygant* only to demonstrate that the lay-off plan was "not sufficiently tailored." *Id.* at 283. In *Paradise*, the plurality looked "to the impact of the [court-ordered] relief on the rights of third parties" *only* to determine whether the relief was "narrowly tailored" to the state's "compelling interest" in remedying racial discrimination. 480 U.S. at 171 (plurality opinion). The plurality concluded that the relief did not "*unnecessarily* trammel the rights" of innocent individuals. *Id.* at 183.

In *Johnson*, the Court also considered whether an affirmative action plan that was adopted for the legitimate purpose of remedying a manifest sexual imbalance in the workforce "*unnecessarily* trammeled the right of male employees." 480 U.S. at 637 (emphasis added). The Court's discussion of "unsettl[ing] . . . legitimate firmly rooted expectation[s]," then, arose only in assessing whether an affirmative action plan was closely tailored to meet a compelling governmental interest. The considerations of *Wygant* and its progeny are simply not present in this case.

Respondents have suggested, Resp. Br. at 23-24, 33-34 & n.18, that *Wygant* and the Court's subsequent cases discussed *supra* support their argument that injuries less severe than discharge "do not give rise to a constitutional claim," *id.* at 12, because they do not "rise to the level of a constitutional deprivation," *id.* at 36. This reliance on the *Wygant* line of cases is misplaced.

If the logic of Respondents' reading of these cases were played out, the cases would stand for the proposition that any type of discrimination by a public employer in promotion, transfer, recall from lay-off and hire *never* "give[s] rise to a constitutional claim," because, as Respondents put it, any action short of discharge does not "rise to the level of a constitutional claim." These cases obviously do not stand for any such proposition.

Contrary to Respondents' argument, the discussion in *Wygant* and subsequent cases is *not* a discussion about constitutional rights. Rather, it is a discussion about what kinds of employment actions are *properly tailored to serve specific compelling state interests.*

The problem facing Respondents is that they did not suggest *any* state interest, let alone a compelling one, that justifies violation of Petitioners' and Cross-Respondents' First Amendment rights. Since the second stage of the First Amendment analysis was never reached, the third stage cannot be reached. As this case stands, the question of least intrusive remedy does not even arise, for Respondents have failed to even suggest a compelling state interest to support *any* of their challenged actions. This Court is not faced with the uncomfortable choice of the lesser of two evils in order to remedy a prior constitutional wrong.

Cross-Respondents O'Brien and Standefer submit that the *Wygant* opinion lays to rest the notion that failure to recall them from lay-off due to political reasons was "insignificant" and does not "rise" to a constitutional violation.

> Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. *Even a temporary lay-off may have adverse financial as well as psychological effects.* A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 58, 106 S.Ct. at 1851. (emphasis added).

Applying *Wygant*, Petitioners and Cross-Respondents come full circle back to the traditional analysis of First Amendment cases. The patronage system is not being used to remedy a prior wrong. The Petitioners and Cross-Respondents are the innocent victims of adverse employment actions that serve no state interests but violate their First Amendment rights. Remedying this situation will simply allow the civil service system to proceed on merit principles without political considerations.

IV. The State Interests Alleged In The Amicus Commonwealth Of Puerto Rico's Brief Are Specious.

A. Stimulation Of Political Effort.

Amicus Commonwealth of Puerto Rico admits that the Illinois General Assembly could not pass a law permanently barring persons of a particular political affiliation from holding positions in government. But apparently Amicus Commonwealth of Puerto Rico believes the General Assembly could pass such a law for a period of four, eight or even twenty years—as long as the incumbent administration holds office.

Amicus Commonwealth of Puerto Rico's assertion that, somehow this situation will correct itself over time is simply not the purpose of the system in this case which is to perpetuate the incumbent party, to create "a significant political effort in favor of the "ins" . . . and against the "outs" i.e. those who may wish to challenge in elections." (para. 11k, Complaint, R.A. 8). This system does not promote political change.

Under the Amicus Commonwealth of Puerto Rico's theory, if a change in administration does occur, that administration will be free to exclude employees from promotion, transfer and recall from lay-off if they are not politically favored. That some other persons in the future may receive the benefits Petitioners and Cross-Respondents now seek is irrelevant. Their benefits are being denied now. Moreover, there is nothing in the record to indicate their denials would be remedied in the future.

Amicus Commonwealth of Puerto Rico's argument turns the Constitution on its head. The First Amendment was designed to protect the rights of the minority from the acts of the majority, not to reward that majority—nor to allow different groups to have their turn at violating constitutional rights.

Amicus Commonwealth of Puerto Rico's argument that the denial of a job is not so significant as to invoke any First Amendment protection is inconsistent with its other argument that political hiring stimulates political activity on behalf of the incumbent party. If, in fact, giving a job does stimulate political activity, that only demonstrates the impact so conditioning jobs has on First Amendment rights.

If stimulation of political effort is an overwhelming state interest, then the positions at issue should be *equally available* for all who are politically active, not just those active on

behalf of the favored party. There is no justification for conditioning jobs only on political effort for the incumbent party.

In *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court rejected stimulation of political activity on behalf of the incumbent party as being a compelling state interest.

B. The Ability Of An Administration To Carry Out Its Programs.

In both *Elrod v. Burns*, 347 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court recognized the need of an administration to implement its policy and programs. It can do so by firing and hiring policy makers for whom political considerations are appropriate; the other employees can be fired if they do not perform their duties. Neither Respondents nor Amicus Commonwealth of Puerto Rico have asserted that political affiliation is in any way relevant to the jobs in this case or relevant to carrying out any government policy. Indeed, they could not make such an assertion.

V. The Respondents' Position Invites Litigation.

Respondents caution against involving the federal courts in public employment decisions. This is not a state interest. Respondents suggest that a possible workload outweighs constitutional guarantees. The federal court system is, as it should be, now open to the First Amendment claims of public employees.

The federal court system has experienced its finest hours when it has protected the rights of citizens. That is what is at stake in this case.

> It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined. *Elrod v. Burns*, 427 U.S. 347, 353 (1976).

Petitioners submit the rule of law they seek will settle the law and lead to far less litigation than the approach of the Seventh Circuit Court of Appeals when it tried to reconcile its prior decisions upholding public employees' First Amendment rights with its decision in this case. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Harassment is actionable even though it does not amount to constructive discharge. Failure to promote is not actionable unless it amounts to constructive discharge. Involuntary transfer is actionable without amounting to constructive discharge. Refusal to grant a transfer is actionable only if it amounts to constructive discharge. And *ad infinitum*. While Petitioners contend these are distinctions without meaning, Petitioners further contend that such distinctions only invite litigation.

In contrast is the simple rule of law sought by Petitioners—that denial of the benefits of promotion, transfer, recall from lay-off and a job cannot be based on political affiliation. It is as simple as the rule of law set forth in *Perry v. Sindermann*, 408 U.S. 593 (1972), *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

It is a rule of law that can be easily understood by the employer. The clear rule of law set forth in *Elrod* and *Branti* has not led to a plethora of litigation regarding political discharge.[2] That law will be clear and make the job of the employer much easier than trying to second guess as to whether their conduct is actionable. If a few public officials choose not to obey this law, then the federal courts must, and should, be open to allow redress of violations of constitutional rights.

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[2] The assertion that upholding Petitioners' constitutional rights will flood the courts is contrary to the empirical evidence. Those circuits which have rejected the constructive discharge distinction have not experienced any significant volume of reported cases. Nor are state courts flooded with cases arising under state laws which prohibit political hiring or promotions.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

Respectfully submitted,

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(5) (2)

Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, *ET AL.*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38 pp

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association (NEA) moves for leave to file the attached brief *amicus curiae* in support of petitioners Cynthia Rutan, *et al.* Consent to the filing of said brief has been obtained from all parties except the Republican Party of Illinois, which has refused to consent.

NEA is the largest public employee organization in the United States, with approximately two million members, virtually all of whom are employed by public educational institutions. Because NEA members in certain

jurisdictions are subject to patronage practices such as those at issue here, NEA has a vital interest in the disposition of this case. Moreover, the Court's decision may have an impact on the exercise of First Amendment rights by NEA members in other contexts.

In the attached brief *amicus curiae*, NEA seeks to demonstrate that the court below erred in holding that patronage employment practices that are not the "substantial equivalent to a dismissal" are permitted by the First Amendment. To support this conclusion the brief establishes three propositions: first, that an employment action need not amount to dismissal in order to give rise to a cognizable First Amendment claim; second, that the interest of the State as an employer is no stronger in the case of patronage hiring, rehiring after layoff, promotion, or transfer than in the case of patronage dismissal, and cannot justify the challenged employment actions; third, that the interest of the State in the preservation of the democratic process is not served by patronage employment practices, and even if it were, the use of such practices with regard to persons already employed by the government goes far beyond what possibly could be necessary to serve that asserted State interest.

For the foregoing reasons, this motion for leave to file the attached brief *amicus curiae* should be granted.

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R. Blank, *Political Parties* (1980) 24
J. James, *American Political Parties in Transition* (1974) 23
F. Sorauf & P. Beck, *Party Politics in America* (6th ed. 1988) 23, 24
J.Q. Wilson, *Political Organizations* (1973) 24
Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 1 (1988) 23
Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87 (1971) 24, 27
Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage*, 73 Amer. Pol. Sci. Rev. 385 (1979) 24
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Sorauf, *The Silent Revolution in Patronage*, 10 Pub. Admin. Rev. 28 (Winter 1960) 23, 24, 25
Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chic. L. Rev. 181 (1982) 24, 25-26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1872, 88-2074

CYNTHIA RUTAN, *et al.*,
Petitioners,
v.
REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in that motion.

SUMMARY OF ARGUMENT

Petitioners Cynthia Rutan, *et al.* ("plaintiffs") alleged that they were deprived of certain employment benefits because of "political considerations," including whether they were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party. The court below acknowledged that if this case had involved *dismissals* from employment, plaintiffs' allegations would, under this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief. The Court of Appeals ruled, however, that the

principles established in *Elrod* and *Branti* should be confined to patronage dismissals and to other patronage employment practices that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54. That ruling is erroneous.

The line drawn by the Court of Appeals cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected association or beliefs do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that First Amendment rights are implicated whenever the State denies an employment benefit to a person because of his or her constitutionally protected association or beliefs. Part I, *infra* at pp. 7-14.

Accordingly, the only basis on which the ruling of the court below could be defended would be that there is a specific governmental interest sufficient to justify the limitations that the challenged patronage practices place on the First Amendment rights at stake. For purposes of analysis, the governmental interests arguably involved in this case must be divided into two distinct categories: (A) the State's interest as an employer in providing for "the effective performance of the public office involved," *Branti*, 445 U.S. at 518, and (B) the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368 (plurality opinion).

With respect to the interest of the State as an employer, *Branti* held that "the question is whether the [State] can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. That formulation is fully consistent with the Court's more developed analysis in *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*, 483 U.S. 378 (1987). The latter cases establish that where an employment action is based on an employee's speech, association or beliefs respecting a matter of "public concern," it is entirely appropriate for a

federal court to scrutinize that action by balancing "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, the relative severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed: the interest to be evaluated is the employee's interest in freedom of speech, association and belief, not his or her interest in employment as such. It follows that unless the State can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved," the interest of the State as an employer would not justify patronage hiring, rehiring after layoff, promotion or transfer any more than that interest would justify patronage dismissal. Part II A, *infra* at pp. 15-21.

It also has been argued—particularly by Justice Powell in dissent in both *Elrod* and *Branti*—that because patronage allegedly contributes to the development of stable political parties, it is essential to the State's interest in the preservation of the democratic process. In *Elrod* and *Branti* the Court found this rationale insufficient to justify patronage dismissals. As the plurality opinion in *Elrod* persuasively demonstrates, patronage is, at bottom, a practice that profoundly disserves the democratic system; therefore it is insufficient as a justification for *any* employment actions. But even if it were accepted that *some* degree of patronage is essential to the preservation of the democratic process, the fact that patronage restricts freedom of belief and association dictates that this governmental interest be pursued through the means least restrictive of those freedoms. *Elrod*, 427 U.S. at 362-63 (plurality opinion). *See also, e.g., Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988). If the State's interest in fostering the democratic process requires the toleration of

any patronage practices—and we contend that it does not —that interest surely does not require the use of patronage with regard to employees *after they have been hired.* Moreover, the use of patronage to govern decisions affecting persons already in the government's employ is even more "intrusive" of employee interests than is patronage hiring, *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1985) (plurality opinion), and such use also puts improper pressure on public employees to "practic[e] political justice" in performing their duties, *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973). It follows that if the State's interest in the preservation of the democratic process justifies any use of patronage, such use should be limited strictly to hiring, and should not extend to rehiring after layoff, promotion, transfer, dismissal, or other post-hiring employment decisions. Part II B, *infra* at pp. 21-29.

ARGUMENT

INTRDUCTION

Because this case was decided on a motion to dismiss for failure to state a claim, it must be taken as true that the employment actions at issue were "substantially motivated by political considerations," including, *inter alia*, whether plaintiffs were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party, Complaint ¶ 11f. It also must be taken as true that the denials of employment benefits to plaintiffs were "a direct and proximate result" of the aforesaid patronage practices. *Id.* ¶¶ 31-34. *See also id.* ¶ 11k ("The purpose and effect of the political patronage system operated under the 'Governor's Office of Personnel' is to limit State employment and the benefits of State employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits.").

If this case had involved *dismissals* from employment, the allegations would, under this Court's decisions in

Elrod v. Burns, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief, unless it were shown that the jobs in question were ones as to which "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.[1] Neither defendants nor the court below assert that *Elrod* or *Branti* were wrongly decided, and they do not suggest that the jobs involved here—which include equipment operator, garage employee, and "Dietary Manager" at a particular facility —are such as to invoke the exception for the "effective performance of the public office involved."[2] Rather, defendants and the court below maintain that the principles established in *Elrod* and *Branti* are not controlling in

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[1] Defendants have argued that plaintiffs failed to state a claim because they did not allege that defendants relied *solely* on political considerations in making the challenged employment decisions. *See also Avery v. Jennings*, 786 F.2d 233, 236 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). Such an allegation is not required. It is hardly conceivable that any employment decision would be based *solely* on a constitutionally prohibited criterion; the decisionmaker will almost always consider, at least to some minimal extent, other factors, such as whether a candidate possesses the stated qualifications for a position. Constitutional protections would virtually evaporate if, as defendants suggest, they were available only where the government acts with utter single-mindedness. The cases adopt no such approach. Rather, if a plaintiff alleges and ultimately proves that protected speech, association or belief was a " 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' "—in an employment action, the burden shifts to the defendant to "show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Thus plaintiffs' allegations of causation are sufficient to state a claim of a constitutional deprivation. *See Branti*, 445 U.S. at 512 n.6. The Sixth Circuit's contrary suggestion in *Avery, supra*, is flatly inconsistent with both *Branti and Mt. Healthy*.

[2] We do not understand defendants to take the position that these jobs fall into that category. In all events, at this juncture (motion to dismiss for failure to state a claim) such a proposition certainly has not been established.

this case because the burden imposed by the challenged patronage practices "is much less significant than losing a job," 868 F.2d at 952. They contend that these principles should be confined to dismissals and to employment actions that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54.[3]

The Court of Appeals offered no reasoned support for the construct it adopted,[4] but it is axiomatic that if the

[3] The Court of Appeals' concept of the "substantial equivalent to a dismissal" makes no sense on its own terms, as Judge Cudahy noted in dissent. *See* 868 F.2d at 959 (Cudahy, J., dissenting). The Court of Appeals stated that in determining whether an employment action is the "substantial equivalent to a dismissal," the courts should apply the familiar definition of a "constructive discharge"—*viz.*, employer conduct that would cause a reasonable person to quit his employment. *See* 868 F.2d at 950. Yet the court also stated that such claims can be brought by persons who did *not* quit. *See id.* at 955-56. This approach is totally illogical: to ask whether a person who is still employed was constructively discharged is a contradiction in terms; and if the test is whether a reasonable person would have quit, then by definition, if the employee did *not* quit, only an "unreasonable" plaintiff can prevail.

[4] The Court of Appeals declared that its decision to limit *Elrod* and *Branti* to discharges (actual or constructive) flowed from two considerations: (i) "the fact that real differences exist between dismissals and other patronage practices" because "absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges," *id.* at 952, and (ii) "the substantial intrusion of the federal courts into the political affairs of the States and other branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges," *id.* As we show in the body of our argument, these considerations fail to support the court's position.

The court below added a third factor to the mix by declaring that actions "falling short of actual or constructive discharge" are actionable if they constitute *"retaliatory harassment,"* but that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off," *id.* at 954 n.4 (emphasis added). This proffered distinction between favoring supporters and retaliating against opponents leads to nonsensical results: an employee denied a promotion because he was not a Republican would have no claim, but "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable" if it were based on political affiliation, *id. See also Pieczynski v. Duffy*, 875 F.2d 1331, 1333, 1336 (7th Cir. 1989) (public employee may be denied hire, promotion or transfer due to his political beliefs or affiliations, but "a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations violates the First Amendment"). And, the Seventh Circuit's construct does violence to the most basic principles of First Amendment law. No one would suggest, for example, that although a public employer could not refuse to promote Jewish employees because the employer disliked Jews, it would be constitutional for the employer to adopt a policy favoring Christian candidates because the employer liked Christians. So too in the context of patronage practices, the distinction proposed by the Court of Appeals, to the extent that it has any operational content, "would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the mo[st] blatant forms of coercion . . ., it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party . . . ." *Branti*, 445 U.S. at 516.

line drawn by that court is to be defended, the defense must either be that patronage practices short of dismissal implicate no First Amendment rights, or that some specific governmental interest justifies the encroachment on First Amendment rights that does result from the patronage practices at issue. We consider—and refute—each of these possible defenses in turn below.

I. EMPLOYMENT ACTIONS BASED ON PATRONAGE NEED NOT AMOUNT TO DISMISSAL IN ORDER TO GIVE RISE TO A COGNIZABLE FIRST AMENDMENT CLAIM

The line drawn by the Court of Appeals plainly cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected speech, association or belief do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that " '[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interfer-

ence.'" *Healy v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 264 (1957) (Frankfurter, J., concurring) ("'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Thus, the Court consistently has rejected the suggestion that only the most onerous sanctions or burdens imposed on speech and association trigger First Amendment scrutiny. For example, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), which involved a limit on contributions to committees formed to support or oppose ballot measures, the Court stated that "[t]o place a Spartan limit—*or indeed any limit*—on individuals wishing to band together to advance their views on a ballot measure . . . is clearly a restraint on the right of association." *Id.* at 296 (emphasis added). And, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court had this to say with respect to agency fees that public employees were required to pay to a union:

> The amount at stake for each individual dissenter does not diminish [the risk that the dissenter's funds will be used to finance ideological activities unrelated to collective bargaining]. For, *whatever the amount*, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for "the propagation of opinions which he disbelieves."

Id. at 305 (emphasis added; footnote omitted). *See also Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868) (tax of one dollar for passing through state of Nevada just as unconstitutional as tax of $1,000).[5]

[5] Applying this properly unyielding principle, the Court has recognized constitutional violations in numerous government actions involving relatively small burdens on First Amendment rights. In the freedom of association area alone, the Court has found that, *inter alia*, the following penalties rise to a level that triggers constitutional solicitude: denying college recognition to a campus organization, *Healy v. James*, *supra*; forbidding all individual campaign expenditures over $1000 per candidate, *Buckley v. Valeo*, 424 U.S. 1, 22-23, 39-51 (1976) (per curiam); forbidding contributions over $250 to committees supporting or opposing ballot proposals, *Citizens Against Rent Control v. City of Berkeley*, *supra*; requiring party disclosure of all campaign contributors, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); withholding mailings, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); revoking passports, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); and compelling disclosure of party membership lists, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). And, in other cases involving freedom of speech and belief, state sanctions that have been found to violate First Amendment rights have included the following: taxing certain types of publications, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); suspending a student from school, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); withholding public television grants, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); denying a property tax exemption, *Speiser v. Randall*, 357 U.S. 513 (1958); denying a tax exemption for any paper and ink used by a newspaper beyond a specified amount, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); excluding persons from taking a bar examination, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); and denying unemployment benefits to persons who have exercised religious beliefs, *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

It also should be noted that the Court has held that damages under 42 U.S.C. § 1983 for violation of First Amendment rights may include compensation for injuries such as impairment of reputation, personal humiliation, mental anguish and suffering, and mental and emotional distress. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *see also Carey v. Piphus*, 435 U.S. 247, 263-64 (1978).

In public employment, as in other contexts, the Court's decisions establish that the First Amendment's field of protection does not lie fallow until the government imposes the most severe sanction available to it (*i.e.*, dismissal). Rather, the guiding principle is that the government cannot "deny a benefit to a person because of his constitutionally protected speech or associations," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). And because this principle is to be "applied . . . regardless of the public employee's contractual or other claim to a job," *id.*, the Court repeatedly has ruled that the State may not impose unconstitutional conditions on employment, even in cases where the employee had no settled expectations of continued service in the job in question. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Perry, supra*; and *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), all involving the nonrenewal of *non*tenured teachers' one-year contracts. *See also Torcaso v. Watkins*, 367 U.S. 488 (1961) (First Amendment violation found where a person had been appointed to the office of Notary Public but had not yet received his commission to serve because of his refusal to declare his belief in God).[6]

[6] In the numerous cases involving actual or threatened dismissals that have been decided by this Court, it never has been suggested that constitutional protection would not have been triggered by a refusal to hire, or by some other lesser sanction. *See, e.g., United States v. Robel*, 389 U.S. 258, 266 (1967) (statute sought "to bar employment . . . for association which may not be proscribed consistently with First Amendment rights"); *Keyishian, supra*, 385 U.S. at 605-06 ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"); *Shelton, supra* (unconstitutional statute applied to teachers rehired on a year-to-year basis); *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose *exclusion* pursuant to a statute is patently arbitrary or discriminatory") (emphasis added). There is nothing in any of these cases to indicate that constitutional protection was available only because employees had developed some settled expectations of continued employment.

In keeping with these principles, the courts of appeals uniformly have recognized that First Amendment claims may arise from employment actions short of dismissal, including such actions as denial of promotion;[7] transfer of jobs (even without loss of pay);[8] reassignment, decrease in responsibility or change of duties;[9] demotion, salary decrease and/or loss of benefits;[10] removal from extra-

[7] *Clark v. Library of Congress*, 750 F.2d 89, 99-102 (D.C. Cir. 1984); *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *MacFarlane v. Grasso*, 696 F.2d 217 (2d Cir. 1982); *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. Unit A 1980); *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970).

[8] *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985), *cert. denied*, 474 U.S. 803 (1985); *Robb v. City of Philadelphia, supra*; *Bowman v. Pulaski Cnty. Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Hughes v. Whitmer*, 714 F.2d 1407, 1421 (8th Cir. 1983) (relief denied for failure to prove that transfer was triggered by First Amendment activity), *cert. denied*, 465 U.S. 1023 (1984); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *cert. denied*, 464 U.S. 918 (1983); *Smith v. West Memphis School Dist.*, 635 F.2d 708, 710 (8th Cir. 1980) (relief denied for failure to prove that transfer was triggered by First Amendment activity); *McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108 of Tazewell Cnty.*, 602 F.2d 774 (7th Cir. 1979); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978); *cert. denied*, 464 U.S. 918 (1983); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977); *Bernasconi v. Tempe Elementary School Dist. No. 3*, 548 F.2d 857 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977); *Acanfora v. Board of Educ. of Montgomery Cnty.*, 491 F.2d 498, 500-01 (4th Cir. 1974) (plaintiff estopped from seeking relief because of omission of information in employment application), *cert. denied*, 419 U.S. 836 (1974).

[9] *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989); *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987); *Allen v. Scribner, supra*; *Bowman v. Pulaski Cnty. Special School Dist., supra*; *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983) (relief denied where protected conduct did not play substantial part in decision to change teaching schedule); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty.*, 676 F.2d 1338 (10th Cir. 1982); *Lemons v. Morgan*, 629 F.2d 1389 (8th Cir. 1980); *Acanfora v. Bd. of Educ. of Montgomery Cnty., supra*.

[10] *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty., supra*.

curricular positions at schools;[11] denial of a salary increase;[12] suspension;[13] refusal to recommend for a promotion;[14] filing letters of reprimand or negative or lowered evaluations;[15] providing negative evaluations to prospective employers;[16] denial of a personal leave day;[17] rescission of permission for leave to attend union meetings;[18] removing certain perquisites of office;[19] and harassment.[20] In many of these cases, the courts explicitly have rejected the argument that because the sanction imposed was less injurious than dismissal there could be no cause of action, or have expressly stated that such lesser sanctions must be treated no differently than dismissals.[21]

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[11] *Knapp v. Whitaker, supra* (removal from position as assistant baseball coach); *Lemons v. Morgan, supra* (removal from position as school radio station manager).

[12] *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 928 (1982).

[13] *Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505 (9th Cir. 1984); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983).

[14] *Hatcher v. Board of Pub. Educ. and Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1555-59 (11th Cir. 1987).

[15] *Knapp v. Whitaker, supra*; *Swilley v. Alexander*, 629 F.2d 1018 (5th Cir. 1980); *Columbus Educ. Ass'n v. Columbus City School Dist.*, 623 F.2d 1155 (6th Cir. 1980); *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980); *Simpson v. Weeks, supra*; *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

[16] *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (*per curiam*).

[17] *Knapp v. Whitaker, supra.*

[18] *Orr v. Thorpe, supra.*

[19] *Reeves v. Claiborne Cnty. Bd. of Educ., supra.*

[20] *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989); *Allen v. Scribner, supra*; *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

[21] *See, e.g., Thomas*, 881 F.2d at 829-30; *Allen*, 812 F.2d at 434 nn. 16 & 17; *Anderson*, 746 F.2d at 507-08; *Bowman*, 723 F.2d at 645; *Hughes*, 714 F.2d at 1421; *Reichert*, 701 F.2d at 1172-74 (Krupansky, J., concurring); *Waters*, 684 F.2d at 837 n.9; *Childers*, 676 F.2d at 1341-42; *Egger*, 669 F.2d at 501-02; *Allaire*, 658 F.2d at 1058 n.2; *Bickel*, 632 F.2d at 1255 n.6; *Yoggerst*, 623 F.2d at 39; *McGill*, 602 F.2d at 779-80; *Bernasconi*, 548 F.2d at 860. *See also Robb*, 733 F.2d at 295 (whereas denial of promotion does not cause property loss for purposes of due process analysis, it could constitute First Amendment deprivation).

Although the holding in *Elrod* dealt only with the constitutional validity of patronage dismissals, the plurality decision recognized that First Amendment interests are implicated by *any* governmental action that restricts an individual's employment opportunities on the basis of his or her beliefs or associations. As the plurality put it, "[r]*egardless of the nature of the inducement*, whether it be by the denial of public employment or . . . by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod*, 427 U.S. at 356 (plurality opinion) (emphasis added) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also Branti*, 445 U.S. at 513-14. With specific reference to employment, the *Elrod* plurality went on to note that "[t]his Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11 (plurality opinion). *See also id.* at 359-60 n.13 ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.").[22]

The upshot of these principles is that "official pressure upon employees to work for political candidates not of the

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[22] Denial of a benefit based on discriminatory treatment of protected speech, association or belief, such as preferring association with one political party rather than association with another, abridges not only First Amendment rights, but Equal Protection guarantees as well. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 n.3 (1987).

worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). Because this statement holds true whether the instrument of such pressure is a dismissal or some lesser employment sanction,[23] the Court of Appeals' decision cannot be defended on the ground that the employment actions at issue here offend no First Amendment rights. If the rule announced by the court below is to be defended, it must be because some specific governmental interest is sufficient to justify the limitation that the challenged patronage practices impose on the First Amendment rights at stake. As we demonstrate below, that defense also fails.

II. THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS AT ISSUE HERE IS NOT JUSTIFIED BY ANY SUFFICIENT GOVERNMENTAL INTEREST

Two governmental interests are offered in support of patronage employment practices. First, patronage is said to serve the State's interest as an employer in the "effective performance of the public office involved." *Branti*, 445 U.S. at 518. *See generally Elrod*, 427 U.S. at 364-

[23] There could in theory be some employment actions taken against employees that would have no potential to induce *any* forsaking of the exercise of First Amendment rights. For example, the fact that a Republican employer might occasionally frown at a Democratic employee presumably would not be enough of a "sanction" to deter even the most minuscule amount of First Amendment activity. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). A constitutional tort, like any other tort, requires *some* injury in order to be actionable.

But the Court need not for present purposes consider whether there could be any "*de minimus*" threshold beneath which no constitutional tort would be actionable, because this clearly is not such a case. The Seventh Circuit acknowledged that the employment actions at issue here "will unquestionably have some negative effects on those people who did not support or are not connected with the party or faction in power." 868 F.2d at 952. In fact, the *de minimus* hypothetical may be dismissed as a strawman: cases for injuries of the non-deterring sort described above simply are not brought by plaintiffs in the federal courts, and could readily be disposed of if they were. *See infra* note 28.

68.[24] Second, it is suggested that patronage serves the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368; this was the theory of Justice Powell's dissents in *Elrod*, *id.* at 382-87, and *Branti*, 445 U.S. at 527-32. As the following discussion makes clear, these two asserted governmental interests are analytically distinct; it therefore is necessary to consider them separately.

A. Where Political Affiliation is Not "An Appropriate Requirement For the Effective Performance of the Public Office Involved," the Interest of the State as an Employer is No More Served by the Patronage Practices at Issue Here than by the Patronage Dismissals Proscribed in *Elrod* and *Branti*

This Court held in *Branti* that the constitutionality of patronage dismissals turns on whether the State "can

[24] The plurality opinion in *Elrod* identified as separate governmental interests "the need to insure effective government and the efficiency of public employees," 427 U.S. at 364, and "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. These two interests, which implicate the State's interests as an employer in providing services to the public, essentially were consolidated into one interest in *Branti*, when the Court stated that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. *See also id.* at 517 & n.12. The *Branti* Court's recognition that these two interests are facets of what is in reality a single State interest is sound. Just as the effective performance of a job in the private sector requires not only efficiency but also fidelity to the directives of the company's managers, the effective performance of a public sector job requires fidelity to the policy directives of higher officials. The fact that those officials presumably speak for the electorate rather than for private shareholders may give the matter an added dimension, but it does not change the nature of the inquiry: either an employee's party affiliation is "an appropriate requirement for the effective performance of the public office involved"—whether in contributing to efficiency or in contributing to fidelity to policy—or it is not.

demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. Because the only practice at issue in *Branti*, as in *Elrod*, was patronage dismissal, the Court had no occasion to address the constitutionality of other kinds of patronage practices. But nothing in the Court's analysis suggests that the State's interest as an employer could justify using patronage to determine who will hold a position through hiring, rehiring after layoff, promotion, or transfer, when that interest would not justify using patronage as a basis for discharging a person from that same position. To the contrary, the *Branti* Court stated that where, as with the assistant public defender positions at issue in that case, the State cannot demonstrate "that party affiliation is an appropriate requirement for the effective performance of the public office involved," "it is difficult to formulate any justification for tying *either the selection or retention* of [the employee] to his party affiliation," *id.* at 520 n.14 (emphasis added). As Justice Powell observed in his dissenting opinion, "[i]f this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees," *id.* at 522.

The teaching that we derive from *Elrod* and *Branti* (*i.e.*, that if the State's interest as an employer does not justify patronage dismissals with respect to a particular job because party affiliation is not "an appropriate requirement for the effective performance of the public office involved," that interest likewise does not justify using patronage as the basis for other employment actions with respect to that job), is confirmed by subsequent cases involving other First Amendment claims arising in the context of public employment. The basic mode of analysis that applies in balancing the interest of the State as an employer against the interest of employees in freedom of speech, belief, and association, was fully developed by the Court in the post-*Branti* cases of *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*,

483 U.S. 378 (1987). Those decisions establish two principles that are crucial to the proper resolution of this case.

First, because the Court in *Connick* recognized the importance of avoiding unduly intrusive involvement by the judiciary in the employment actions of government officials, it specifically indicated when judicial scrutiny is, and is not, appropriate:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146 (emphasis added).[28] *Connick* thus makes clear that where, as here, an employment action is based on an employee's beliefs or association relating to matters of "political . . . concern," judicial scrutiny is appropriate.[29]

The Court of Appeals' expressed desire to minimize judicial oversight of public employment, *see* 868 F.2d at 954, therefore cannot justify closing the courthouse doors to employees who claim that they have been penalized for their beliefs and association with respect to matters of political concern. And, that court's apprehension that every employment decision made by a member of the in-party might be challenged as politically discriminatory by a member of the out-party, *id.*, is no different in nature

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[28] *See also Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (judicial review of "the multitude of personnel decisions that are made daily by public agencies" is not appropriate "*[i]n the absence of any claim* that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights") (emphasis added).

[29] Although the quoted passage from *Connick* refers to employee "expression," the Court has always recognized that if employees are protected in their speech, they are equally protected in their beliefs and association. *See, e.g., Branti*, 445 U.S. at 515.

than the apprehension voiced by some employers that every employment decision made by a male might be challenged as sexually discriminatory by a female, or that every employment decision made by a white might be challenged as racially discriminatory by a Black. The judicial system is capable of determining whether a challenged employment action is in fact attributable to the improper motive alleged by the plaintiff;[27] and the reality that the determination may sometimes be difficult to make does not justify closing the courts to claims of political discrimination any more than it would justify doing so with respect to claims of discrimination based on race, sex, speech or other impermissible factors. *See Davis v. Bandemer*, 478 U.S. 109, 125 (1986) ("that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability").[28]

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[27] *See generally Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

[28] It is, after all, "the uniqueness of our Constitution and our system of judicial review [that] courts at all levels are available and receptive to claims of injustice, large and small, by any and every citizen of this country." *Rankin*, 483 U.S. at 392 (Powell, J., concurring).

Moreover, in this context as in others, the courts have ample mechanisms for terminating litigation in appropriate circumstances. Summary judgment is available where warranted, *see, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). Also, even where a claim is *meritorious*, a public official sued in his individual capacity is entitled to qualified immunity if the right the official is alleged to have violated was not "clearly established," *see Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and a denial of qualified immunity is immediately appealable to the extent that it turns on a question of law, *see Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). What is more, claims against a governmental entity under 42 U.S.C. § 1983 may be maintained only if the action complained of is attributable to the "final policymaking authority" of the entity, *see Jett v. Dallas Indep. School Dist.*, —— U.S. ——, 109 S. Ct. 2702, 2723-24 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Given these and other mechanisms, the Court of Appeals' fear that claims of political discrimination will overtax the courts is greatly exaggerated. And, in all events, the court's apprehension provides no principled basis for refusing to entertain these claims. *Connick, supra*; *Davis v. Bandemer, supra*, 478 U.S. at 126.

Second, *Connick* and *Rankin* indicate how the courts are to arrive "'at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). *See also Rankin*, 483 U.S. at 384. The role of the courts is to give "full consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and then, to the extent that the government's interest is affected by the employee's speech, belief or association, to balance that interest against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, "the nature of the employee's expression" is to be considered, *Connick*, 461 U.S. at 150 & n.9, because it bears on "[the employee's] interest in making her statement," *Rankin*, 483 U.S. at 388.[29] But the severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed in the balance: the interest to be considered is the employee's interest in freedom of speech, association, and belief, not his or her interest in employment as such.

Thus, if the balance results in a determination that the interest of the State, as an employer, does not outweigh the interest of the employee in making a particular statement, holding a particular belief, or exercising freedom of association, it follows that the State, as employer, may

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[29] *See also Connick*, 461 U.S. at 152 ("We caution that a stronger showing [of harm to the government's interests] may be necessary if the employee's speech more substantially involved matters of public concern.").

not impose *any* employment sanction on the employee for that statement, belief, or association. As Justice Scalia has aptly put it, the question is "whether, given the interests of this [government] office, [the employee] had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future." *Rankin*, 483 U.S. at 399 (dissenting opinion) (emphasis in original).[30]

Branti defines the proper basis for applying these principles in a patronage case. Because "the state interest element of the [*Pickering/Connick*] test focuses on the effective functioning of the public employer's enterprise," *Rankin*, 483 U.S. at 388,[31] the *Branti* formulation, which asks whether the State has demonstrated "that party affiliation is an appropriate requirement for the effective performance of the public office involved," is entirely consistent with this Court's established jurisprudence in the area of public employment. If the State can make the necessary demonstration, party affiliation may be taken into account in determining who holds a particular office. If the State *cannot* demonstrate that party affiliation is an appropriate requirement for a position, then, insofar as the State's interest as an employer is concerned,

[30] If the law were otherwise, the courts would be called upon in every public employment case to decide whether the particular employment action taken by the government in response to an employee's protected conduct was the most appropriate response, or whether some other action—for example, suspension rather than dismissal—would have been more appropriate. That is not the role of the courts. To be sure, if the balance in a particular case favors the State, and the government therefore has a right to take steps to protect its legitimate interests at the expense of the employee's right of speech or association, it is incumbent upon the government to use the least restrictive means of protecting its interest as an employer, *see infra* at pp. 26-27, and this will in some cases require scrutiny of the *nature* of the action the government has taken. But that is a far cry from weighing the *severity* of the employment action, as such, in the *Pickering/Connick* balance.

[31] *See also id.* at 393 n.* (Powell, J., concurring).

party affiliation is no more relevant in determining whether one employee should be hired, rehired after layoff, promoted, or transferred into the position than in determining whether another employee should be removed from the position.

Inasmuch as the necessary demonstration has not been made for the positions involved in this case—which include equipment operator, garage employee, and Dietary Manager, *see supra* at p. 5 & note 2,[32]—it follows that the First Amendment infringement worked by the patronage practices at issue cannot be justified by any interest of the State as an employer.

B. The State's Interest in the Preservation of the Democratic Process is Not Served by Patronage Practices, and Even if it Were, the Use of Such Practices Would in Any Event Be Unjustifiable With Regard to Persons Already Employed by the Government

We turn now to the interest of the State in the preservation of the democratic process, which is the interest that Justice Powell championed in his dissents in *Elrod* and *Branti*. Moreover, it appears to be this interest, and not the interest of the State as an employer, that persuaded the court below and certain other courts of appeals to limit the reach of *Elrod* and *Branti*.

According to Justice Powell, patronage practices are essential incentives for participation in the political process by those who otherwise would not become politically active. *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

[32] The Court has recognized that seldom, if ever, can patronage be shown to contribute materially to the efficiency and effectiveness with which employees perform their duties. *See Elrod*, 427 U.S. at 364-67 (plurality opinion); *Branti*, 445 U.S. at 517-18 n.12. And, while there certainly are some positions for which patronage is justified as a means of ensuring "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration," *Elrod*, 427 U.S. at 367 (plurality opinion), that category is not a broad one, *see id.* at 367-68; *Branti*, 445 U.S. at 517-20, and the positions at issue here plainly are not within it.

This alleged increase in participation, he indicated, is in turn necessary to assure "stable political parties and avoid excessive political fragmentation." *Id.* at 383. And it was the position of Justice Powell that without stable political parties, the influence of single-issue special interest groups would predominate, and " 'unrestrained factionalism . . . [might] do significant damage to the fabric of government,' " *Branti*, 445 U.S. at 528 (Powell, J., dissenting) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).[22] More specifically, Justice Powell felt that it is at the state and municipal levels that the incentives of patronage are particularly necessary for the efficient functioning of political parties, because there otherwise would be little incentive for political involvement at those levels. *Elrod*, 427 U.S. at 384-85 (Powell, J., dissenting).

Justice Powell's concerns were, of course, unpersuasive to the majority of the Court in both *Elrod* and *Branti*. Justice Brennan's plurality opinion in *Elrod* acknowledged that "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms," 427 U.S. at 368, but the plurality concluded that "[t]he [democratic] process functions as well without the practice [of patronage], perhaps even better, for patronage dismissals clearly also retard that process," *id.* at 369.

We find Justice Brennan's reasoning persuasive, and submit that employment patronage is, at bottom, a practice that in all of its manifestations profoundly disserves the democratic process. As the *Elrod* plurality stated, in

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[22] Justice Powell also was concerned that with the hypothesized weakening of parties, and especially the weakening of party ties and identification with parties, the electorate would be less able "to choose wisely among candidates." *Branti*, 445 U.S. at 531 (dissenting opinion). He asserted that voters who "traditionally have relied upon party affiliation as a guide to choosing among candidates . . . [will be] less able to blame or credit a party for the performance of its elected officials." *Id.* "In local elections, a candidate's party affiliation may be the most salient information communicated to voters." *Id.* at 531 n.17.

an analysis that applies with equal force to *all* patronage employment practices:

> Patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.

Id. at 369-70. *See also* Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 1, 71 (1988) ("appointments or dismissals with political . . . conditions attached will . . . tend to distort or skew the political process in favor of entrenched interests"); J. James, *American Political Parties in Transition*, 85 (1974) (patronage incentives create party disunity by provoking quarrels over distribution of rewards, and repel from party activity those who might respond to other types of incentives); Sorauf, *The Silent Revolution in Patronage*, 10 Pub. Admin. Rev. 28, 29 (Winter 1960); Sorauf, *Patronage and Party*, 3 Midwest J. of Pol. Sci. 115, 123, 125 (1959) (patronage may create intra-party squabbles just as easily as intra-party cohesion or vitality).

Nor do we accept Justice Powell's assumption that without the availability of financial incentives in the form of patronage, citizens would not become involved in political activities. Even before *Elrod* was decided there had been a strong decline in the use of patronage in most jurisdictions, due to the adoption of merit systems as well as other factors, *see Elrod*, 427 U.S. at 354 and n.8 (plurality opinion), and we are aware of nothing to suggest that the democratic process has withered in those jurisdictions, *see id.* at 369. *See also* F. Sorauf & P. Beck, *Party Politics in America* 96-99 (6th ed. 1988) (in spite of impediments to the viability of state party organiza-

tions such as the extension of civil service systems, "state parties [are] in important respects healthier today than they [were] twenty years ago"; "state and local parties may be stronger today than they have been in many years"); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 118-20 (decline of patronage "accompanied by no perceptible weakness of the parties"; "in states such as Wisconsin political parties have survived and achieved a certain measure of strength and discipline without the inducement of political appointments").

Although Justice Powell thought it "naive" to believe that people become involved in local politics out of a "public service impulse," *Elrod*, 427 U.S. at 385 (Powell, J., dissenting), the contention that only the prospect of material benefits draws people into local politics has been rejected by knowledgeable authorities. "[I]t is likely that the majority of persons who are active members of local party organizations seek neither material benefits nor the achievement of large ends, but merely find politics—or at least coming together in groups to work at politics—intrinsically enjoyable." J. Q. Wilson, *Political Organizations* 110 (1973). *See also* F. Sorauf & P. Beck, *Party Politics in America, supra*, at 110-13; R. Blank, *Political Parties* 133 (1980) (patronage explains no more than "a small portion of party activity"); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 31-33; Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chic. L. Rev. 181, 201-02 & nn.131-32 (1982).[34]

[34] Indeed, it has in recent years been questioned whether patronage employment practices are in fact effective in promoting political party participation by the beneficiaries of those practices. *See, e.g.*, Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage*, 73 Amer. Pol. Sci. Rev. 385, 389-90 & n.3, 390-91, 394-95, 397 (patronage "does not necessarily produce high levels of active support"; jobs "leave much to be desired as organization-maintaining incentives"); Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 94-97 (1971); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 30, 33 ("Patronage no longer is the potent inducement to party activity it once was."); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 120-21.

Furthermore, the "party-building" rationale posited by Justice Powell is not "unrelated to the suppression of ideas," as it must be in order to justify an infringement of First Amendment rights. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). To the contrary, not only does that rationale relate to the *content* of political belief and association, but its very purpose is *to induce individuals to alter their political beliefs and associatons.* This rationale thus stands in sharp contrast to the kinds of government purposes generally accepted as compelling in the First Amendment context.

For example, if the State takes the position (rightly or wrongly, depending on the nature of the position involved, *see supra* at pp. 20-21) that only a Democrat properly can perform a certain job, the State's purpose is not to influence people to become Democrats (although that may certainly be the effect of its actions), but rather to select the best person for the job. The governmental purpose thus invoked, *if supported by the facts*, is unquestionably legitimate, and its proper reach is clearly defined. The "party building" rationale offered by Justice Powell, on the other hand, is based solely on the content of political beliefs and association; it has as its very purpose the enhancement or diminution of particular political beliefs and associations; and it is potentially unlimited in its ramifications.[35] As one commentator has noted:

> [The State's asserted interest in] induc[ing] time and money to political campaigns[] is dependent on the coercive effect of the patronage practice at issue. Yet that coercive effect is the very reason patronage is presumptively hostile to the Constitution. Thus it

[35] For example, on Justice Powell's reasoning it would appear that electoral victors would not violate the First Amendment if they were to pay cash bonuses, out of government funds, to their supporters.

> would be contradictory to argue that patronage actions short of dismissal do not have a significant coercive effect while simultaneously asserting the need to coerce partisan support.

Note, *First Amendment Limitations on Patronage Employment Practices*, *supra*, 49 U. Chic. L. Rev. at 200 n.120.

In short, the State's interest in the preservation of the democratic process is not served (indeed, it is disserved) by employment patronage, and thus this interest does not provide any justification for the use of patronage in making employment decisions. It is important to point out, however, that this conclusion does not mean that all patronage practices are constitutionally proscribed. As previously indicated, there is under *Branti* a significant class of positions—including most "policymaking" positions—as to which the use of patronage may be justified by the State's interest *as an employer*. There simply has been no demonstration that the preservation of the democratic process generally, or of political parties specifically, requires a broader range of patronage than this.

But if the Court should conclude otherwise, and find some legitimacy in Justice Powell's "party-building" rationale, it then would be necessary to determine *which* additional patronage practices should be sanctioned. Indeed, Justice Powell himself declared only that this asserted governmental interest should lead to "allowing *some* patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting) (emphasis added). *See also id.* at 387 (Powell, J., dissenting) (criticizing plurality because "no alternative to *some* continuation of patronage practices is suggested") (emphasis added). The note of caution in those statements is dictated by the settled prescript that when limitations on freedom of belief and association are permissible, the government must accomplish its legitimate purpose by the least restrictive means available. As the Court has declared: "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that

broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). *See also Elrod*, 427 U.S. at 362-63 (plurality opinion); *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988); *Roberts v. United States Jaycees*, *supra*, 468 U.S. at 623; *Buckley v. Valeo*, 424 U.S. 1, 29 (1976); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *Cf. Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2764, 2758 n.6 (1989).

Accordingly, if the Court were to conclude—contrary to our submission—that some patronage employment practices other than those permitted by *Branti* are necessary to insure the survival of "stable political parties," the foregoing principle would mandate that the line be drawn at patronage *hiring*, and that the use of patronage not be allowed with regard to persons *after they have been hired*. It strains credulity to assert that the hypothesized governmental interest in the survival of political parties requires that such parties be allowed not only to assure their followers of preference in hiring, but also to assure them that patronage will dictate who is to be rehired after layoff, promoted, transferred, or otherwise favored or disfavored after hire. *See* Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 106 (1971) ("for the overwhelming number of [patronage] jobs it is the original preferment, not the continuation of the grantee in the job, which is a valuable resource for the [party] chairman"). Such an all-encompassing use of patronage simply is not the least restrictive means of protecting the viability of political parties.

Furthermore, the use of patronage with respect to those already employed by the government is in other respects more objectionable than the use of patronage in hiring. Although the First Amendment injury inflicted by patronage does not vary depending on the nature of the employment action involved, it cannot be denied that the use of patronage to stunt the careers of persons al-

ready hired is more "intrusive," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (plurality opinion), than the use of patronage to determine who will be hired in the first place.

Moreover, a system that rewards or punishes employees for the degree of political support and activism they demonstrate *while in the public employ* inevitably puts pressure on such employees to demonstrate political loyalty by using their government positions for the benefit of a political party. One need not be omniscient to recognize that public employees, knowing that their job security and aspirations for advancement will be determined by their demonstrated loyalty to the party, will in some cases be impelled to serve the party (rather than the public) not only off the job, but on the job as well, by providing favors to members of the party or otherwise using their positions to benefit the party. In this respect patronage conflicts not only with "[the] demonstrated interest in this country that government service should depend upon meritorious performance rather than political service," *Connick*, 461 U.S. at 149, but also with the distinct and equally important interest that public employees not be seen to be "practicing political justice" in performing their duties. *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).[26]

For these reasons, if the Court were to determine that the alleged interest of the government in using patronage as a means of fostering the democratic process is sufficient

[26] Our position in this regard should not be misunderstood. We certainly carry no brief for federal or state laws that prohibit *voluntary* political activities by public employees, and we reject the notion that to allow public employees, *as citizens*, to engage in voluntary political activities is tantamount to allowing government positions to be used for such activities. Our point is simply that if public employees are told, through operation of a patronage system, that their career opportunities are dependent on demonstrated political loyalty, the employees will be impelled to demonstrate that loyalty not only through outside political activities, but through conduct in their jobs as well.

to justify "some patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting), beyond those already permitted by *Elrod* and *Branti*—a position we strongly believe should not be adopted—the line should in any event be drawn at hiring, and the Court should proscribe the use of patronage with respect to persons already employed in positions for which political affiliation is not an "appropriate requirement," *Branti, supra*.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed to the extent that it requires the dismissal of any of plaintiffs' claims.

Respectfully submitted,

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No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF INDEPENDENT VOTERS OF ILLINOIS-INDEPENDENT PRECINCT ORGANIZATION, COMMON CAUSE/ILLINOIS, BETTER GOVERNMENT ASSOCIATION AND MICHAEL L. SHAKMAN, AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Independent Voters of Illinois-Independent Precinct Organization, Common Cause/Illinois, Better Government Association and Michael L. Shakman respectfully move for leave to file the accompanying Brief *Amici Curiae* in this case. Written consent to the filing of the Brief has been obtained from the petitioners and from respondent State officials, including the Governor of the State of Illinois. The Republican Party of Illinois and its officials have, however, declined to consent. The Brief *Amici Curiae* supports the position of the petitioners and is filed within the time allowed for the filing of petitioners' Brief.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office both in party primary and general elections. Common Cause/

Illinois is the Illinois branch of Common Cause, a national non-partisan citizens' organization. Common Cause/Illinois is active in seeking to obtain a free, fair and competitive electoral process in Illinois. Better Government Association is a citizens' organization which promotes efficiency in governmental services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and a member of Independent Voters of Illinois-Precinct Organization. He has been a candidate for public office.

Each of the *amici* has an interest in maintaining a free, fair electoral system. They also have an interest in maintaining freedom of political association; this is especially the case for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

In this case, the Court of Appeals for the Seventh Circuit has held that virtually every term and aspect of public employment, other than discharge, including hiring, salaries, promotions, demotions, transfers and the like, can all constitutionally be conditioned on support of an officially favored political party. This is held to be the case not just for policy-making employees, but for all government workers.

Amici are concerned that such a governmental employment system, by which important terms of employment are conditioned on support of a favored political organization, is inconsistent with their interests in maintaining freedom of political association. As was recognized in *Elrod v. Burns*, 427 U.S. 347, 356 (1976):

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, *as well as the multitude seeking jobs.*

Id. at 356 [emphasis supplied].

Amici are also concerned that the effect of a politically conditioned employment system, such as the one in the present case, is inconsistent with their interests in a free and fair political process. Indeed, the whole point of such an employment system is for the coercive power of the state to be used to provide an electoral advantage for a favored political organization. As the Court noted in *Branti v. Finkel*, 445 U.S. 507 (1980):

> [A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process.

Id. at 513-14 n.8.

Petitioners' Brief is expected, understandably, to present the case from the point of view of the serious impact which a politically conditioned employment system has on the rights of public employees and job applicants to freedom of speech and political association under the first amendment. The proposed Brief *Amici Curiae*, on the other hand, discusses the serious impact which such a system has on the rights of voters to a free and fair electoral system. This is a point on which petitioners' Brief is not expected to focus.

Respectfully submitted,

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INTERESTS OF THE AMICI

This case concerns the constitutionality of a system by which important terms and aspects of state employment, other than discharge, are conditioned on support of an officially favored political party. *Amici* are concerned with

the harmful and unconstitutional effects such a politically conditioned employment system has on the functioning of the democratic political process, both by impairing the rights of the public to freedom of political association and in distorting the electoral process.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Common Cause/Illinois is the Illinois branch of Common Cause, a national non-partisan citizens organization which seeks to promote a fair electoral system. Common Cause/Illinois is active in seeking to obtain a free, fair and competitive electoral process in Illinois. Better Government Association is a citizens' organization which promotes efficiency in government services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and member of Independent Voters of Illinois-Independent Precinct Organization who has been a candidate for public office.

Each of the *amici* has an interest in promoting a free and fair electoral system. Each also has an interest in maintaining freedom of political association; this is especially so for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

STATEMENT OF THE CASE

The case is before the Court on a limited factual record, the District Court having dismissed the complaint. Thus, for purposes of this review, the complaint must be taken as true. Unless it would appear to a certainty that plaintiffs could not prevail under any state of facts that could be proved at a trial in support of their claims, the decision of the Court of Appeals denying or restricting those claims must be reversed. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

The complaint alleges that the State of Illinois operates an employment system for State jobs by which important employment decisions are conditioned on political support of the Republican Party. Complaint, par. 11k, R.A. 8. Persons who do not have the political support of the Republican Party are excluded from being hired for State jobs. Complaint, par. 10a, R.A. 6. Existing State employees similarly are prevented from receiving promotions and related raises or favorable job transfers, which they otherwise would receive, if they do not have the partisan support of the Republican Party officials. Complaint, pars. 7a, 8a, R.A. 4-5. And employees who are laid off from State jobs are prevented from being switched to other positions or being called back to work when the layoff ends, if they do not obtain Republican Party sponsorship. Complaint, par. 9a, R.A. 5.

Republican Party political support in turn depends on the job applicants' or employees' voting records (whether they vote in Republican Party primary elections)[1], on their

[1] Under Illinois law, a recorded party declaration is required to vote in party primary elections. Ill. Rev. Stat., ch. 46, §7-44 (1987).

making financial campaign contributions to the Party and on their doing or promising to do campaign work for the Party and its candidates for public office. Complaint, par. 11h, R.A. 7. People who support other political groups, or who vote in other party primary elections, are excluded from receiving the political support needed to be hired or otherwise favorably considered for State job decisions. Complaint, par. 11k, R.A. 8.

Plaintiffs are individuals who were not supporters of the Republican Party. Complaint, pars. 19a-23e, R.A. 13-17. For that reason, under the State's employment system they were prevented from being hired for a State job or, if they already had such a job, they were denied promotions, raises, important job transfers, or continued employment after a layoff, in each case which they otherwise would have obtained. Complaint, par. 11k, R.A. 8.

Plaintiff James Moore is prevented from being hired by the State as a prison worker; Cynthia Rutan, a rehabilitation counselor with the State's Department of Rehabilitation Services, is prevented from receiving a promotion (and an accompanying raise); Franklin Taylor, a State road worker, is prevented from receiving a promotion and raise or having an available transfer to his home county approved; and Richard Standefer, a garage worker, and Dan O'Brien, a kitchen worker in the State's Department of Mental Health and Development Disabilities, were prevented from being assigned to other jobs or called back to work when laid off, unlike other workers; all because they did not have the support of the Republican Party or had made the mistake of voting in a Democratic Party primary. Complaint, pars. 19a-23e, R.A. 13-17. Mr. O'Brien eventually was rehired after he made the necessary arrangements to obtain Republican Party sponsorship. Complaint, par. 22g, R.A. 16.

All of the jobs in question, except the job of Mr. Standefer, are covered by the State's Personnel Code[2]—that is, they are nominally civil service jobs.

This politically conditioned hiring system is implemented through a formal Executive Order of the Governor which prohibits employment decisions involving hiring, promotions, transfers and reemployment from being made without the approval of his patronage office. Complaint, pars. 11-11k, R.A. 6-8. The complaint alleges that this system applies to the many thousands of jobs in the executive branch of the government of the State of Illinois for which employment decisions are made each year. Complaint, pars. 11a-11b, R.A. 6.

The complaint alleges that the "purpose and effect" of this politically coercive employment system is to provide the Republican Party and its candidates with political campaign assistance, and to discourage people from opposing the Governor and the Republican Party in elections. This is alleged to create a significant political effort for that officially favored political party and against any other political groups. Complaint, par. 11k, R.A. 8.

The complaint alleges that this system violates the first amendment rights of plaintiffs to freedom of speech and political association. Complaint, par. 24g, R.A. 19.

The United States District Court of the Central District of Illinois dismissed the complaint on the ground that it failed to state a claim upon which relief could be based.

On appeal, the Court of Appeals for the Seventh Circuit held that the Constitution does not bar the State from conditioning employment decisions—hiring, salaries, promo-

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[2] Ill. Rev. Stat., ch. 127, § 63b101 *et seq.* (1987).

tion or demotion—on political affiliation, unless the action amounts to a discharge. Thus, it affirmed the dismissal of Mr. Moore's claim that he was prevented from being hired for political reasons. As to other plaintiffs, it remanded their claims to determine if the adverse job decision amounted to a discharge, holding that any disadvantage short of actual or constructive discharge was not actionable.

SUMMARY OF THE ARGUMENT

This Court has long held that important public benefits, including public employment, cannot be conditioned on a basis which infringes constitutionally protected interests such as freedom of speech and association. *Perry v. Sindermann*, 408 U.S. 593 (1972). Official pressure on employees to support political candidates not of their own choice constitutes coercion of belief in violation of the Constitution. *Connick v. Myers*, 461 U.S. 142 (1983).

The decision of the Court of Appeals, which would limit constitutional protection to instances in which there is a political discharge but would allow other important terms of employment to be politically conditioned, is contrary to this long-established precedent. Moreover, the distinction drawn by the Court of Appeals is inconsistent with reality. Jobs are important to people. Where important terms of employment are politically conditioned, those who would have public employment face a serious impairment of their freedom of speech and association. The decision would subject public employees to political coercion, undermining the decisions of this Court in *Branti v. Finkel*, 445

U.S. 507 (1980), and *Connick v. Myers*, 461 U.S. 142 (1983).

Where important job decisions are conditioned on support of a favored political party, the public's rights to a free and fair political and electoral process are denied. Such a system stifles political competition. And it unconstitutionally tilts the electoral scales for the favored political organization, denying opposing voters and candidates an equal voice and choice. The impact of so conditioning public jobs is especially severe on racial minorities who are given a Hobson's choice between employment and political liberty.

Only a very compelling state interest could justify the conditioning of hiring and other employment decisions on political affiliation. No state interest, compelling or otherwise justifies the massive political employment system described in the complaint. *Branti v. Finkel*, 445 U.S. 507 (1980). Political affiliation and financial contributions are wholly irrelevant to fitness for the jobs in question. A politically conditioned employment system inhibits the free functioning of democracy, rather than advancing it, since it seeks to assist only a single favored political party and to dissuade other political activity. Employment decisions which are conditioned on restrictions on speech and association are not exempt from constitutional inquiry.

ARGUMENT

I.

FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES AND APPLICANTS ARE SERIOUSLY IMPAIRED WHEN IMPORTANT TERMS OF EMPLOYMENT SUCH AS HIRING, SALARY LEVELS AND PROMOTIONS ARE CONDITIONED ON SUPPORT OF AN OFFICIALLY FAVORED POLITICAL PARTY.

This Court has long held that important public benefits, including public employment, cannot be denied on a basis which infringes constitutionally protected interests—such as freedom of speech and association. As Mr. Justice Stewart wrote for a unanimous Court in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> . . . most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100; *Wieman v. Updegraff*, 344 U.S. 183, 192; *Shelton v. Tucker*, 364 U.S. 479, 485-486; *Torcaso v. Watkins*, 367 U.S. 488, 495-496; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288; *Baggett v. Bullitt*, 377 U.S. 360; *Elfbrandt v. Russell*, 384 U.S. 11, 17; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606; *Whitehill v. Elkins*, 389 U.S. 54; *United States v. Robel*, 389 U.S. 258; *Pickering v. Board of Education*, 391 U.S. 563, 568.

408 U.S. at 597.

This constitutional protection of public employment is important to preserve society's interest in robust debate and vigorous political competition. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

Thus, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held it to be unconstitutional to discharge public employees for supporting the wrong political party. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held that the state could not fire employees to facilitate the political hiring of their replacements. And as Mr. Justice White noted more recently in *Connick v. Myers*, 461 U.S. 138 (1983), (citing *Elrod* and *Branti*),

> We have recently noted that *official pressure* upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights.

461 U.S. at 149 (emphasis supplied).

Notwithstanding this long line of authority barring the conditioning of public benefits on restraints of freedom of speech and association, the decision of the Court of Appeals in the present case would apply constitutional protection only to political firings. It would allow the state to maintain an extensive system by which other important terms of public employment—hiring, promotion, salary and job discipline—can be expressly conditioned on the most serious imaginable limitations on first amendment rights,

restrictions on how one can vote, with which party one can affiliate, and to whom political financial contributions may be given. Under the decision of the Court of Appeals, this would be the case no matter how extensive such a system is, what political conditions are imposed or what effect it has on the electoral process.

This restriction which the Court of Appeals would place on the constitutional rights of those who would be public employees is plainly inconsistent with the precedents of this Court. It would severely impair rights of speech and association. And it would undermine completely this Court's holdings in *Branti* and *Connick* that public employees are constitutionally protected from political coercion.

A. The Decision Of The Court of Appeals Is Inconsistent With Well-Established Authority.

The holding of the Court of Appeals which would prohibit only political firings but allow other terms of public employment—hiring, promotion, salary levels, transfers, job discipline—to be politically conditioned is contrary to long-standing precedents of this Court. Forty years ago, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court stated that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.' " Significantly, the reference was to appointment, not removal. *Id.* at 100.

This same language was quoted by the Court in *Weiman v. Updegraff*, 344 U.S. 183 (1952), in emphasizing that the rights of those who would be state employees to freedom of political affiliation were entitled to constitutional protection against an overbroad loyalty oath. The reference again was to appointment. This quotation is cited in both *Elrod*, 427 U.S. at 357, and *Branti*, 445 U.S. at 515 n.10.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court held that it was unconstitutional to bar members of "subversive" organizations from being *hired* for or retained in state employment. Hiring was forbidden from being conditioned on political views. Similarly, in numerous "loyalty oath" cases this Court has held it to be unconstitutional to condition *obtaining* public employment on political affiliation. *See, e.g., Whitehill v. Elkins*, 389 U.S. 54 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964). *See also Torasco v. Watkins*, 367 U.S. 488 (1961), in which a religious test for *obtaining* a governmental position was held unconstitutional.

Nowhere in the case law is there any suggestion that the Constitution allows the state to condition hiring and other terms of public employment on restrictions of rights of speech or association. To the contrary, such a constrained reading of the Constitution is directly contrary to long-established law.

B. Conditioning Important Terms Of Employment On Political Affiliation Materially Impairs First Amendment Rights.

The decision of the Court of Appeals would draw a constitutional distinction between conditioning continued employment on political affiliation and similarly conditioning hiring, salaries and other terms of employment. This distinction is, however, inconsistent not only with the long-standing case law, but with the basic nature of reality.

Jobs are important to people. Not only are they a livelihood, significant as that is, they provide a central element of self-worth. Conditioning job opportunities and

career advancement on politics accordingly is one of the most effective ways by which the state can chill rights of political speech and association.[3]

It is not necessary to decide which is worse, to be let go for supporting the wrong party, or to be excluded from employment opportunities with the government altogether, or to have one's earnings reduced or a career put on hold, all for not paying money to the right party.[4] Each of these is a very serious impairment of basic constitutional rights.

Freedom of political association is inconsistent with the conditioning of any important terms of one's employment on political affiliation. If you are denied the opportunity even to be considered for a job for which you are well qualified simply because you do not contribute money to a particular party committee, you do not have freedom of political association in a material way. If your salary level depends on your continued support of a favored political organization, it is a fiction to say you have freedom of political association. If you can be demoted, or if you can be denied a promotion that you have earned, solely because of your political affiliation, you do not have freedom of political association.

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[3] This is illustrated by the fascinating report that when it became clear in Hungary that Communist Party membership was no longer a condition of job advancement, enrollment in the Party dropped precipitously. New York Times, November 4, 1989, at 5 col. 1.

[4] Of course, it all depends on a particular case. It may be more damaging to be denied opportunity for a good job in the first place for voting wrong than to have one's continued employment in some other job depend on political payments. Indeed for some, such as Ms. Rutan, there is no relevant employer other than the State. It is effectively the only employer of rehabilitation counselors. For constitutional purposes, the emphasis must be on the effect of the system on freedom of speech and association.

It does not take a firing to infringe the First Amendment rights of employees or applicants. Whenever sufficiently important terms of employment are based on political affiliation, rights of speech and association are impaired. This is plainly the result of the public employment system described in the complaint. Indeed, there is no valid constitutional distinction between conditioning continued public employment on political affiliation and so conditioning other important job decisions.

The decision of the Court of Appeals would seriously impair the rights of public employees and applicants to freedom of speech and association. As such, it is inconsistent with society's interest in robust debate and vigorous political competition, which is at the core of democratic values.

C. The Decision Of The Court Of Appeals Would Permit Public Employees To Be Subject To Political Coercion.

The decision of the Seventh Circuit would, moreover, severely undercut the holdings of *Branti* and *Connick* that public employees may not be coerced through control over their employment into support of a favored political party. Where an employee's salary level, or her ability to get a promotion, or his potential of being demoted, rests on his or her political support (money and work) of an officially favored party, the employee is plainly subject to political coercion, barred by *Branti* and *Connick*. A regime as would be allowed by the decision of the Court of Appeals would reindenture public employees to political masters.

As this Court has often repeated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . .

Board of Education v. Barnette, 319 U.S. 624, 642 (1943). The decision of the Court of Appeals would seek to reconfigure our constitutional constellation by providing that the state can indeed compel political affiliation by an entire system of conditioning jobs, promotions and salaries on support of a single party.

II.

A POLITICALLY CONDITIONED EMPLOYMENT SYSTEM IMPAIRS THE RIGHTS OF THE PUBLIC TO A FREE AND FAIR POLITICAL SYSTEM.

Where public jobs are conditioned on support of an officially favored political party, it is not only the constitutional rights of employees and applicants which are abridged. Such a system also severely impairs the free competition of both ideas and political parties and the conduct of fair elections which are of the essence of our democratic political system. This occurs in several ways.

A. Support Of Competing Political Interest Is Dissuaded.

The rights of the public to freedom of association are impaired by a politically conditional employment system. Conditioning jobs on support of one political organization necessarily injures the ability of competing political groups and their members to attract support, both among existing public employees and among those who wish to keep open the possibility of seeking employment. Where, as here, the political employment system is extensive, involving many thousands of jobs, the impact on the public's freedom of association is significant. Many, perhaps most, people will avoid openly supporting competing political groups if it means a significant disadvantage to their careers or a loss of employment opportunity.

This impact in terms of deterring support of competing political groups was clearly recognized by the plurality opinion in *Elrod v. Burns*.

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, *as well as the multitude seeking jobs.*
>
> . . . .
>
> . . . [P]atronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied).

These observations are relevant whenever significant terms of employment are politically conditioned. Indeed, here the complaint specifically alleges that "the purpose and effect" of the politically conditioned employment system is "to discourage opposition to the Governor and the Republican Party in elections." Complaint, par. 11k, R.A. 8. This effect occurs whenever significant terms of public employment are so conditioned, not just when there are political discharges. Jobs are sufficiently important that actions such as denying an opportunity to be hired or to be promoted, or providing lower income levels, all for political reasons, are entirely adequate to chill the free exercise of political choice.

B. The System Is Designed To Tip The Political Scales.

A politically conditioned employment system is also inconsistent with the interests of voters to a free and fair electoral process. The effect of such a system is to use the coercive power of the state to produce money and support for the favored political organization as a price for favorable job decisions. Where, as here, such practices are extensive, they operate to tilt the electoral scales by

providing electioneering support solely for a state-favored party. Here the complaint specifically alleges that the system is designed to create a "significant political effort" in favor of officially favored candidates and against their challengers. This is the point of the system—to give the favored party and its candidates an electoral advantage. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. . . . Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant. . . .
>
> . . . Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369. This point was also recognized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

It must be emphasized that the impact of a political employment system on the political system is not merely some theoretical concern. The purpose and the effect of patronage employment in Illinois is to tilt the political scales in favor of the party controlling the jobs. This is a central fact of political life in Illinois. And it operates by conditioning job openings and advancement on party support. It is not necessary to threaten discharge to produce a political effort. Where important job conditions depend on party support, employees and applicants do what they have to do.

This system seriously undermines the whole democratic process, chilling support for competing political organizations and using coercive state power to give a discriminatory advantage to a favored political group. Such a system is inconsistent with our basic concepts of democracy.

The Constitution does not permit the state explicitly to utilize its power to aid only a single favored political party. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld federal funding for presidential campaign expenses. It focused special attention, however, on the issue of whether the provisions of the law unfairly discriminated between candidates or parties. A statute providing for state funding solely for an officially favored political party would be patently unconstitutional under *Buckley*. Similarly, the scheme here, which is designed to advantage a single favored party through the state's coercive power over public jobs, is constitutionally infirm. Indeed, it may be regarded as a central tenet of the Constitution that there can be no officially favored political party. Such a concept belongs to totalitarian regimes, not democracy.

C. Political Rights Of Minorities Are Particularly Infringed.

The conditioning of public jobs on partisan political service violates the rights of all citizens to a free and fair political system. The impact of such practices is, however, especially severe on racial minorities. Their opportunity for employment is often more limited. So the possibility of a public job is a correspondingly more important interest.

To require such citizens as a price of getting a public job or a raise to pledge loyalty to political interests which they might not otherwise support is particularly harsh. It is a form of political serfdom, in which the price of a job is nothing less than the loss of political freedom.

Moreover, political affiliation in many areas correlates strongly to race. To allow jobs to be conditioned on political party affiliation is, in reality, often effectively the same as to allow it to be based on race.

III.

NO STATE INTERESTS ARE SERVED BY CONDITIONING STATE JOBS ON SUPPORT OF AN OFFICIALLY FAVORED POLITICAL PARTY.

Only a compelling state interest can justify State activities which burden fundamental rights, or which utilize suspect classifications. Even then the state must act in a way which minimizes the constitutional burden or injury. *Carey v. Brown*, 447 U.S. 455, 464-65 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

Here fundamental rights are burdened, *and* a suspect classification is utilized. Conditioning important aspects of public employment on support of a single favored political organization admittedly burdens the rights of employees and applicants to freedom of speech and political association. These are fundamental rights indeed. *Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, a political employment system expressly utilizes a classification for job decisions—party affiliation—which is based on the content of political speech. This is an inherently suspect classification, and is appropriately subject to the most exacting scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981).

In weighing suggested justifications for the political conditioning of public employment, this Court has been quite rigorous. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held:

> '[U]nless the government can demonstrate an overriding interest,' . . . 'of vital importance,' requiring that a person's private beliefs conform to those of the *hiring* authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

445 at 515-16 (citations omitted, emphasis supplied).

Given the extensive impact which the massive, politically conditioned hiring system in issue here has on freedom of speech and political association, only a very compelling state interest could justify such a system. In fact, however, *no* legitimate state interest, compelling or otherwise, justifies a system by which hiring and other job decisions are conditioned on politics.

A. Political Affiliation Is Unrelated To Fitness For The Jobs In Issue.

Political affiliation has, needless to say, no bearing on fitness for the specific jobs in issue in this case. Party affiliation is completely irrelevant to Ms. Rutan's service as a rehabilitation counselor, or to Mr. Moore's qualifications to be a prison guard or to Mr. Taylor's job of operating road equipment. To the contrary, to the extent that political criteria are, as here, substituted for experience and qualification, the result is inefficiency in governmental service. Not only are less qualified persons hired and promoted, the whole concept of building a career in public service is undermined. Where political party affiliation and financial contributions are the keys to getting a job or being promoted, the quality of public service is diminished, not enhanced.

This Court has explicitly rejected the notion that any interest in governmental efficiency justifies conditioning hiring for public jobs on political affiliation. In *Branti v. Finkel*, the Court held that, except for certain exempt positions, the interest in maintaining governmental effec-

tiveness and efficiency is not sufficient to justify political employment practices. Indeed, the Court observed that it is the interests of a political party, as opposed to governmental interests, that are served "to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party." *Id.* at 517, n.12.

Branti specifically dealt with the issue of possible state interests said to justify politically conditioned *hiring*. Mr. Justice Stevens, writing for the Court, stated:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation.
>
> '. . . . By what rationale can it even be suggested that it is legitimate to consider, *in the selection process*, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).'

Id. at 520 n.14. (emphasis added).

This rejection of a compelling state interest for political hiring was not simply an unnoticed footnote. Mr. Justice Powell, in his dissent, explicitly noted this passage as indicating that the thrust of the Court's decision was that there is no constitutional distinction between hiring and firing in terms of justifying state interests:

> The Court purports to limit the issue in this case to the dismissal of public employees. Yet the Court also states that '*it is difficult to formulate any justification for tying either the selection* or retention of an assistant public defender to his party affiliation.'

Id. at 522 n.2. (Citations omitted; emphasis added.) Mr. Justice Powell repeatedly described the case as one involving patronage hiring and retention. Thus he stated, in the first paragraph of his dissent that:

> [T]he Court further limits the relevance of political affiliation to *the selection* and retention of public employees.

Id. at 521 (emphasis added).

Branti was, of course, a case involving hiring. The discharges at issue were occasioned solely to facilitate the hiring of politically favored individuals. Thus the purported justifications focused not on the desire to fire politically, but on the desire to hire based on political considerations. As such, the decision in *Branti* is, it is submitted, conclusive of the issue of justifying state interests for political hiring.

B. A Politically Conditioned Employment System Inhibits Democracy Rather Than Advancing It.

The decision of the Court of Appeals suggests, albeit without analysis, that a politically conditioned employment system serves a state interest in promoting democracy—acting as an inducement to campaign activity.[5] This is the same justification for patronage hiring which was suggested by Justice Powell in his dissent in *Branti*, but which was rejected by the Court.

There is no reason to think that this justification is more compelling with respect to conditioning hiring and salaries on political support than it is for conditioning continued employment. In both cases the effect is to impair rights

[5] No justification at all would seem to be able to be presented for conditioning jobs on an applicant's voting record.

of speech and association, to strengthen a single party and to burden political competition.

Amici submit that the politically conditioned employment system involved here inhibits democracy rather than advancing it. Our democratic system does not consist of a single officially favored political party. To the contrary, our democracy depends on political competition, on a robust and vigorous marketplace of ideas in the political realm. This is, of course, why freedom of speech and political association are so central to our constitutional structure.

Where the state, however, seeks to promote a single party's fortunes, and to use its coercive power over employment to inhibit the activities of competing groups, democracy is weakened not strengthened. The free competition of political ideas is impaired if the state can withhold important public benefits from those who support the wrong party.

It is not a proper state interest to stimulate political activity on behalf of a single incumbent political faction and to retard it for other political groups. This does not "strengthen parties". It strengthens a single party. It does not promote campaigning. It reduces political competition. Campaign activity is not stimulated when political competition is burdened by the loss of important public benefits. In short,

> "while the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."

Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972, Stevens, J.), *cert. denied*, 410 U.S. 928 (1973).

Whatever might be asserted to be the state interest in conditioning jobs on political affiliation and activity generally, those interests are inapplicable to the present case. The jobs in question here are all civil service jobs. Significantly, Illinois has declared its state policy to be that for these jobs, decisions are to be based on merit and not politics. Ill. Rev. Stat., ch. 127, § 63b101 *et seq.* (1987). The employment system in issue here is inconsistent with the public policy of the State of Illinois. There can be no legitimate state interest in acting contrary to the legislatively declared state policy.

C. A Political Employment System Does Not Minimize Burdens On The First Amendment.

Any interest of the state in promoting democracy by stimulating political campaign activity must be accomplished in a way which minimizes any burden on fundamental rights. To the extent public employment is conditioned on political affiliation, it can hardly be said that burdens on the first amendment rights of employees and job applicants are minimized. The state has many available methods to promote vigorous campaign activities and political competition without impairing the first amendment rights of its employees. It can finance campaign costs, or provide a forum for political discussion or even provide special opportunities for employees to participate in campaign activities. But when it does so it must act in a way which is neither coercive nor discriminatory. *Buckley v. Valeo*, 424 U.S. 1 (1976).

There is, in any event, no necessity to burden the rights of employees and applicants in order to promote electioneering. Vigorous political competition thrives in numerous jurisdictions where jobs are not conditioned on political

support. And political employment systems are often associated with the lack of effective political competition.

D. Government Employment Decisions Are Not Exempt From Constitutional Inquiry.

The Court of Appeals also concluded that even though a politically conditioned employment system may indeed impair first amendment rights, it would be too intrusive to state or local governments to do anything about it.

This conclusion both dramatically devalues the first amendment and overstates the practical difficulties of fashioning relief. Given the importance which the rights of speech and association have under our constitutional system, federal courts can hardly simply take a pass just because it is a state or local government's employment practices which are in issue. This Court has for many years held that employment decisions of states and local government are subject to constitutional scrutiny, whether they involve hiring or firing. See, e.g., *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). To place such decisions off limits to constitutional scrutiny would be to cut a huge hole in the Bill of Rights.

This case itself, moreover, demonstrates that the constitutional rights of public employees can well be protected without intruding upon the proper domain of state government. The practices in issue here are not some underground system; they are adopted through a formal Executive Order of the Governor and implemented by an official office under the Governor. If this Court confirms that such an employment system is inconsistent with the Constitution, non-intrusive relief can be readily fashioned, leaving the State free to adopt any employment system it

wants, so long as it is not based on unconstitutional conduct. It may, indeed, be expected that governmental officials generally obey the law where the law is clearly stated. It is, of course, no harder to exclude political conditions from public employment than any other unconstitutional condition—religion, race or sex.

In fact, it may be the case that the "constructive discharge" distinction adopted by the decision of the Court of Appeals would be more intrusive than simply recognizing that conditioning important job decisions on politics is unconstitutional. Under the distinction set forth by Judge Manion, a court would have to explore not only whether political considerations were the basis of employment decisions, but whether those decisions were tantamount to discharge—a case by case exploration that would require vastly more inquiry as to government decisions than simply reviewing whether there is a politically conditioned employment system. And by not providing clear guidance to public officials, such a distinction would serve to promote the coercion of employees, not inhibit it.

The present case concerns an entire system of conditioning routine jobs on politics so as to tilt the political scales. No state interest justifies such a system. No intrusion into governmental affairs is required to recognize that such a system is contrary to basic constitutional principles.

CONCLUSION

The decision of the Court of Appeals, to the extent that it holds that terms or aspects of State employment may be conditioned on political support of a favored party, should be reversed.

Dated November 16, 1989

Respectfully submitted,

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Nos. 88-1872 and 88-2074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

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v.
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Respondents.
and
MARK FRENCH, *et al.*,
Cross-Petitioners,
v.
CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONERS/ CROSS-RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONERS/CROSS-RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 90 national and international unions having a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* supporting petitioners/cross-respondents with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

As stated in *Branti* v. *Finkel*, 445 U.S. 507, 513 (1980), this Court held in *Elrod* v. *Burns*, 427 U.S. 347 (1976), "that the newly elected Democratic sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them 'because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.' 427 U.S., at 351." The common ground between the two separate opinions that supported *Elrod's* holding was their reliance on *Perry* v. *Sindermann*, 408 U.S. 593 (1972). In *Perry* this court established that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech. *Id.* at 597-98, quoted in *Branti*, 445 U.S. at 514-15. The *Branti* court, following *Perry* and *Elrod*, ruled that two assistant public defenders could not be discharged by the recently appointed public defender, a Democrat, on the ground that they were Republicans. The court below held that *Elrod* and *Branti* are applicable only to discharges or to employment decisions which are the "substantial equivalent to a dismissal." 868 F.2d at 949-52, following *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).

I.

The framework for analysis of public employees' First Amendment claims is stated in *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), which followed *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968):

> Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

And, as just noted it is settled law that even though a person has no "right" to a valuable governmental benefit

and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *Perry*, 408 U.S. at 597.

Given this standard, it is clear that the plaintiffs and others in their position have a constitutionally-protected interest. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a "valuable governmental benefit." With respect to applicants for new employment, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), is directly in point, for it was there held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights. The right to vote and to associate with the political party of one's choice clearly "rank among our most precious freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 30, (1968). See also *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976); *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973).

As this case stands, there can be no doubt that both the freedom of political association and to vote according to one's choice are *severely burdened* by respondents' system. Employment benefits are made on the approval of the Governor's Office of Personnel, which makes use of the individual's (and his relatives') voting records and financial and other support of the Republican Party and its candidates, and the approval of state or county Republican Party officials. The party, in turn, determines the individual's and his family's voting history, past financial contribution and volunteer work for the Party and its candidates, and the future potential of such support. R.A. 7.

The right not to associate with and support a political party in these ways is clearly established. See *Tashjian*, 479 U.S. at 216, n.7; *Abood* v. *Board of Education*, 431 U.S. 209, 234-36 (1977). It bears emphasis, that Re-

spondents' political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candidates, or opponents of the ruling faction within the Republican Party. Any such activity would almost certainly disqualify the applicant in the minds of the Republican Party officials and the Governor's Office of Personnel.

II.

The court below opined that if the rights recognized in *Elrod* and *Branti* were recognized with respect to promotions, transfers and hires, "it would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. The Court's concern is wholly unjustified because the complaint challenges a general *system* as applicable to all personnel decisions covering tens of thousands of state employees, rather than independent individual employment decisions. Moreover, the Court erred in relying on *Bishop* v. *Wood*, 426 U.S. 341 (1976) and *Connick* v. *Myers*, *supra*. *Bishop* did not involve a claimed violation of First Amendment rights. *Connick* strongly affirmed the rights of government employees not to be penalized for engaging in First Amendment activities on matters of public concern or for participating in political affairs.

The court below also relied on the governmental interest articulated by Justice Powell in his dissents in *Elrod* and *Branti*—that the support which a patronage system gives to political parties helps to maintain a stable political system. While "[m]aintaining a stable political system is, unquestionably, a compelling state interest," *Storer* v. *Brown*, 415 U.S. 724, 736 (1974), *Storer* itself shows by example that effectuating this interest does not automatically outweigh all First Amendment rights. See *id.* at 740; *Williams* v. *Rhodes*, 393 U.S. at 31-32; *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989). Thus, if *Branti* leaves any room for considering that interest, then at the very least the

complaint must be reinstated and the case remanded for the thorough and painstaking inquiry which Judge Ripple outlined in dissent below. 848 F.2d at 1414-15.

But we submit that *Branti* does *not* leave open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. The Court explained in *Branti*:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

In this analysis, the distinction the court below would draw between this case and *Branti* is simply irrelevant. Political patronage decisionmaking favors a "partisan interest" rather than a "governmental interest" whether that decision results in the discharge of an employee or the denial of a promotion or transfer or a failure to hire. Thus, where political party affiliation is *not* relevant to "maintaining governmental effectiveness and efficiency," 445 U.S. at 517, there is *no* legitimate overriding government interest that justifies patronage decisionmaking. On the contrary, allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure.

ARGUMENT

1. Because the district court dismissed the complaint in this case, for present purposes the "facts" consist of the allegation of that complaint concerning the political patronage system in the State of Illinois challenged as violative of the First Amendment rights of government employees and applicants for government employment. We therefore begin by setting out the essential allegations concerning the operation of that system:

> 11e. The "Governor's Office of Personnel" controls all hiring, transfers, promotions and other significant aspects of employment by approving or disapproving such transactions on an individual basis using the Executive Order as its authority.
>
> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.
>
> 11g. In giving or refusing approval of a particular individual for a particular employment position the "Governor's Office of Personnel" makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level.

> 11h. The Republican Party screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potention of such financial support, the potential of future "volunteer" work by the applicant in behalf of the Republican Party and its candidates. Attached hereto and incorporated herein as Exhibit B is the application form for promotion in State government employment used by the Republican Party in Sangamon County. [R.A. 7-8.] [1]

2. In *Connick* v. *Myers*, *supra*, 461 U.S. at 142, this Court set forth the framework for analysis of the First Amendment claims of public employees:[2]

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980). Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.[3]

Accordingly, we first discuss the interests of the employees who are affected by the challenged patronage system

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[1] "R.A." refers to the Appendix to the State Respondents' Brief in Opposition. Exhibit B appears at R.A. 24.

[2] Except as the context indicates otherwise, the word "employee" will encompass applicants for employment throughout this brief.

[3] This case differs from *Pickering* and *Connick* in that efficiency of the public service is not one of the countervailing considerations relied on by the court below.

as alleged in the complaint herein, and then discuss the countervailing state interests which have been asserted in defense of this practice.

(a) *Elrod*, *supra*, and *Branti*, *supra*, struck down patronage practices which threatened (or effectuated) the discharge of public employees because of their political affiliations. The court below held that the principle of those decisions is to be limited to discharges or "practices that 'can be determined to be the substantial equivalent of dismissal.'" 868 F.2d at 949, quoting *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).[4]

We submit that this blanket restriction on First Amendment claims, which automatically protects patronage practices which affect employment decisions such as the refusal to hire, promote or transfer is inconsistent with the theoretical underpinnings of *Elrod* and *Branti*. As noted in the Introduction, those decisions were predicated on the broad principle established in *Perry* v. *Sindermann*, *supra*, 408 U.S. at 597-98, where the Court reasoned:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the

[4] The court below stated that the

> Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery* v. *Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986), which upheld patronage hiring practices against First Amendment attack. [868 F.2d at 952.]

The court below misunderstood *Avery*. The Sixth Circuit did not there approve the blanket use of political tests for hiring. Rather, that court concluded that there "is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, . . . and a patronage system that relies on family, friends and political allies for recommendations." 786 F.2d at 237.

> government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.
>
> We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, [357 U.S. 513, 526], unemployment benefits, *Sherbert* v. *Verner*, 374 U.S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6; *Graham* v. *Richardson*, 403 U.S. 365, 374. But, most often, we have applied the principle to denials of public employment. [Citations omitted.] We have applied the principle regardless of the public employee's contractual or other claim to a job. [Citations omitted.]
>
> Thus, the respondent's lack of contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim.

With respect to applicants for new employment, *Torcaso* v. *Watkins*, *supra*, 367 U.S. 488, is directly in point. There, it was held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights (in that case, freedom of religion): "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.* at 495-96.

The patronage practices at issue here (and the claims of the individual plaintiffs) also encompass promotions and transfers and rehires. Although no First Amendment case in this Court deals with precisely such employment decisions, the constitutional standard enunciated in *Perry* reaches "valuable governmental benefit[s]," 408 U.S. at 597, generally and is *not* limited to continued employment alone, *id.* The *Perry* Court's opinion—quoted

above—could not be clearer in that regard. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a valuable governmental benefit.

This is not to say that the precise nature of the benefit may not be pertinent to the balance which is to be struck down between the employees' interest and those of the government. Our point at this juncture of the argument is simply that the court below erred in holding that an employee (or applicant for employment) who challenges a patronage practice is cut off at the threshold unless he or she has been discharged actually or constructively.

It is incontrovertible, too, that the patronage system which is described in the complaint herein affects rights which "rank among our most precious freedoms." *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30. As Justice Black, speaking for the court, reminded:

> [W]e have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." [339 U.S. at 30-31, footnote omitted.]

The First Amendment right to support political parties was recently reaffirmed in *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1987):

> The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973). [479 U.S. at 214.]

As this case stands, there can be no doubt that the freedom of political association and to vote according to one's choice are *severely burdened* by this patronage system. Employment benefits are made to depend on the approval of the Governor's Office of Personnel, which "makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." R.A. 7. The Republican Party, in turn, "screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future 'volunteer' work by the applicant in behalf of the Republican Party and its candidates." *Id.* See pp. 6-7, *supra*.

In *Tashjian*, the Court expressly recognized a First Amendment right not to register with a political party:

> [T]he requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the States requires regardless of the actual beliefs of the individual voter. Cf. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (1943). [479 U.S. at 216, n.7.]

So too, the right not to make a financial contribution to a political party is protected. *Abood* v. *Board of Education*, *supra*, 431 U.S. at 234-36. The Court there held that under the First Amendment, government employment may not be conditioned on payments to a labor organization to the extent that a portion of that organization's funds are used for partisan political expenditures. Given that decision, the right not to contribute to

an organization like the Republican Party which is devoted entirely to partisan political activities cannot be controverted.

Supporting a political party by providing personal time and effort to its causes, even more than registering as a party member or making a financial contribution, necessarily entails a public expression of agreement with the party which may be contrary to an individual's beliefs. Cf. *Tashjian*, *supra*. So too, it will often be highly offensive to a citizen to come before a political party official to whose views he is opposed, to satisfy whatever demands that official may make. Certainly this infringement on personal liberty is incomparably greater than the impersonal requirement of displaying the state motto on an automobile license plate, which was struck down in *Wooley* v. *Maynard*, 430 U.S. 705 (1977) or the financial contribution requirement which was disapproved in *Abood*, *supra*.

As a matter of settled law, then, the challenged patronage system clearly violates the petitioners' rights *not* to associate politically with the Republican Party. It is equally true, and it bears emphasis, that this political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candiates. See *Elrod*, 427 U.S. at 355-56 (plurality opinion). Even a Republican party official who would be willing to approve the hire or promotion of an individual who has not voted for or has not expressed his willingness to perform services for or contribute money to the Republican party would be exceedingly unlikely to approve an applicant who was active in the Democratic opposition to Republican party candidates. Indeed, given the partisan political character and purpose of the system, a Republican party official who gave his endorsement to a supporter of the Democratic party would be subject to serious criticism if not worse within his party constituency and would be unable

to justify his recommendation to the Governor's Office of Personnel which controls appointments. The same would likely be true with respect to employees who support primary candidates from a different faction of the Republican party for personal or ideological reasons, or otherwise oppose the incumbent Republican party officials.

(b) We turn next to the interests which, in the court of appeals' view, "strongly weigh against broadly expanding [beyond dismissal and constructive discharge] the rule *Branti* and *Elrod* enunciated." 868 F.2d at 953.

The first of those considerations is that "[r]ecognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. We submit that this consideration is invalid with respect to the complaint in this case because granting relief herein (and *a fortiori* reinstating the complaint) would not have the consequences which the court below anticipated, and because that court misunderstood the two decisions cited as supporting its conclusion.

The complaint challenges the legality of a general *system* as applicable to all personnel decisions covering tens of thousands of state employees (R.A. 6, ¶ 11a). The respondents have not contended (and indeed could not at this procedural stage) that the adverse personnel decisions affecting the petitioners were *not* made pursuant to that system. That challenge does not require judicial evaluation of the legality of individual personnel decision where the basis of the decision is in dispute, but only of a system which on its face makes political party affiliation an employment consideration. Thus even if the court of appeals' concern might be entitled to a particular individual personnel decision, that concern is simply inapposite here.

The court of appeals' concern is, in any event, invalid even in the context of individual personnel decisions. The

burden on public employers and on the litigation system which the court below feared is not different from that imposed by any of the well-recognized causes of action making it unlawful to refuse a valuable government benefit for invidious reasons. And the right at stake here is no less precious.

Indeed, *Pickering* v. *Board of Education*, *supra*, and *Perry*, *supra*, most assuredly hold that employees may challenge their discharges on the ground that the discharge is based on the exercise of their First Amendment rights. There is no evidence that the courts have been faced with any significant amount of litigation based on spurious claims of political motivation even with respect to discharges where, on the court below's own assumption, the harm to the employees is the most serious, and the incentive to conjure up claims would be the greatest. This experience serves to allay the lower court's "doubt" as to the ability of public employees in order to overturn entirely proper adverse personnel decisions.

In this connection, the court below wrote: "Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate." 868 F.2d at 564. With this we agree. But it simply does not follow that adverse personnel decisions motivated by disagreement with employees on these issues, etc., are not protected by the First Amendment. On the contrary, such cases as *Pickering*, and *Perry* show that while the First Amendment is particularly solicitous of participation in partisan politics its protections extend further. And the court below errs when it says "it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals." *Id.* Politics is "meaningfully separated" from the "other considerations" referred to by the First Amendment itself.

The court below also quoted and relied on *Bishop* v. *Wood*, *supra*, 426 U.S. at 349, where this Court said: "Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." However, *Bishop* is clearly inapposite because the plaintiff employee in that case raised *no* First Amendment issue. Rather, the employee contended that his discharge deprived him of a liberty interest which was subject to due-process safeguards; one component of his claim was that the reasons given for his discharge were false. The sentence quoted by the court below was part of a discussion which rejected that argument.[5] *Bishop* thus applied the rule that a public employee must demonstrate the loss of a "liberty" or "property" interest in order to have a constitutional right to a hearing; that rule had been established in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and its companion case, *Perry*, 408 U.S. at 599. But, as we have seen, *Perry* also held that a public employee may challenge adverse employment decisions "because of his constitutionally protected speech or associations," regardless of the public employee's "contractual or other claim to a job." *Id.* at 597, quoted at p. 9, *supra*.

Whereas *Bishop* v. *Wood* is simply not in point, *Connick* v. *Myers*, *supra*, the other decision cited by the court below, is squarely inconsistent with that court's thesis that the complaint herein must be dismissed in order to avoid "an unprecedented intrusion into the political affairs of the states and other branches of federal govern-

---

[5] See also the immediately preceding sentences:

> The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake. [426 U.S. at 349, footnote omitted.]

ment." 868 F.2d at 954. We begin by placing the phrase which the court below quotes from *Connick* into its context. The relevant portion of this Court's opinion in that case states:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter. [461 U.S. at 143, footnote omitted.]

As this Court also wrote in *Connick*:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. [461 U.S. at 146, emphasis added.]

Association (or nonassociation) with a political party, which is at stake in this case, is incontrovertibly on the "citizen" side of the line which was articulated in *Connick* and its antecedents. Justice White explained for the *Connick* Court:

> In all of . . . the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" *by the fear of discharge from joining political parties* and other associations that certain public officials might find "subversive." The explanation for *the Constitution's special concern with threats to the right of citizens to participate in political* affairs is no mystery. . . . [T]he Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amend-

> ment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). [461 U.S. at 144-45, emphasis added.]

The entire Court agreed on this basic principle; see also 461 U.S. at 161-62 (dissenting opinion).

The other consideration which the court below believed outweighs the public employee's interest in being protected "against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee," 868 F.2d at 953, is that articulated by Justice Powell in his dissenting opinions in *Elrod* and *Branti*. The court below quoted approvingly the following passage from Justice Powell's *Branti* dissent:

> Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to over-arching issues of domestic and foreign policy." [*Branti*, 445 U.S. at 532 (Powell, J., dissenting).]

As the Court reiterated at the last Term, "[m]aintaining a stable political system is, unquestionably, a compelling state interest." *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989), citing *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). In *Storer* the Court held that the prevention of "splintered parties and unrestrained factualism" justified provisions of California's Elections Code which denied ballot position to an independent candidates for elective public office who

had a registered affiliation with a qualified political party within one year prior to the immediately preceding prior election. *Id.*

But in *Storer* the Court also reinstated the claims of two other prospective candidates for office who challenged California's requirement that an independent candidate for President or Vice President must obtain signatures and a nominating petition for not less than 5% nor more than 6% of the entire vote cast in the preceding general election and to obtain such signatures in a specified 24-day period. The Court remanded those claims "to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President" by this requirement. *Id.* at 740. See also *Williams* v. *Rhodes*, 393 U.S. at 31-32, and *Anderson* v. *Celebrezze*, 460 U.S. 780, 801-802 (1983) (holding that the State's interest in political stability cannot justify protecting the Republican and Democratic parties from external competition by the virtual exclusion from the ballot of political candidates from other parties). So too, in *Eu* itself the Court held that the interest in political stability did not justify the challenged California statute which significantly burdened a political party's First Amendment rights because the State "never adequately explains how banning Parties from endorsing or opposing primary candidates advances that interest." 109 S.Ct. at 1022.

In short, the interest in political stability does *not* automatically outweigh all First Amendment rights; indeed *Elrod* and *Branti* at a very minimum establish that proposition. On this record, consisting as it does of the complaint alone, not nearly enough is known about the operation of the patronage system, its impact on the political rights of public employees and its effect, if any, on preserving political stability to justify the decision below. The point was ably made by Judge Ripple in his dissent from the panel opinion:

> [W]e know very little, on the basis of the complaint alone, about the impact of this political patronage system on the first amendment rights of job applicants. We also know very little about the justification for this political patronage system. In my view, this case should be remanded to the district court. There, after adequate development of the record, the district court will be able to accomplish several tasks that are essential to a full and fair analysis of this case: 1) a thorough examination of the operation of *this* patronage system and the effect of that operation on the plaintiff; and 2) a thorough examination of the justifications for this particular system proffered by the defendants. [848 F.2d at 1414, emphasis in original. See also *id.* at 1414-15.]

Accordingly, Judge Ripple concluded the complaint should be reinstated and the case remanded to the district court for a full development of the facts. This is the very least that is required. See also *Storer*, *supra*; cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

(c) To this point we have indulged the court of appeals' major premise: that *Branti* leaves open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. As we have shown, even on that premise, reversal of the decision below and remand for development of the facts are in order.

As we now show, the court of appeals' premise is wrong. While *Branti* arose in the context of a discharge, its rationale invalidates political party patronage decisionmaking across the board except where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. And for the excepted class of government positions it is entirely con-

stitutional to take political party affiliation into account in making discharges as well as in making other personnel decisions.

Branti states the limit on the Constitution's protections of political party affiliation in the following terms: "[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517. And the *Branti* Court went on to explain:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

We cannot see any escape from the proposition that if the benefit of political patronage decisionmaking to the favored political party—and to its stability—is a "partisan interest" and not a "governmental interest" that overrides First Amendment rights in the discharge context, that benefit is, once again, a mere "partisian interest" and not a "governmental interest" in the hiring, transfer and promotion contexts. And if that is so, we can see no escape from the conclusion that political patronage decisionmaking in those regards is unconstitutional. For the reasons we have given, these are certainly "valuable governmental benefits" and denying such

benefits on political party affiliation grounds certainly adversely affects the exercise of the most basic of First Amendment rights *to some extent*. That being so, patronage decisionmaking passes constitutional muster if, and only if, justified by a legitimate overriding *governmental* interest. And *Branti* states that where political party affiliation is *not* relevant to the "effective performance of the public office involved" there is *no* such legitimate overriding government interest that justifies patronage decisionmaking.

Nor, we submit, is there any sound reason to seek to escape *Branti*'s logic. The *Branti* rule not only serves government interests but through its stated limit serves the most important interests of the political parties by saving out a host of the most important and desirable government offices from the First Amendment's proscription on patronage decisionmaking. And, as the passage from *Branti* quoted above recognizes, going further and allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure. That harm greatly outweighs the supposed gains in political party stability and in avoiding litigation over government personnel decisions the court of appeals found of such moment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the case remanded to the District Court with directions to reinstate the complaint and for further proceedings consistent with the constitutional analysis set forth herein.

Respectfully submitted,

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Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

October Term, 1989

CYNTHIA RUTAN, et. al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et. al.,

Respondents,

and

MARK FRECH, et. al.,

Cross-Petitioners,

v.

CYNTHIA RUTAN, et. al.,

Cross-Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME, AND BRIEF AMICUS CURIAE OF THE NORTH CAROLINA PROFESSIONAL FIRE FIGHTERS ASSOCIATION

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On Writ of Certiorari To The United States
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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OUT OF TIME

Pursuant to Rule 36 of the Rules of this Court, Amicus Curiae North Carolina Professional Fire Fighters Association (NCPFFA) respectfully moves this Court for leave to file out

of time the attached brief as amicus curiae in support of Petitioners. Each of the parties has consented to the filing of this amicus brief and correspondence confirming this consent has been forwarded to this Court.

NCPFFA is a statewide organization in existence for more than a decade consisting of thirteen local fire fighter associations throughout the State of North Carolina. NCPFFA has appeared as amicus in other federal constitutional litigation including litigation involving First Amendment rights of public employees. NCPFFA and its members are vitally interested in the important constitutional issues before this Court. The issues before this Court affect NCPFFA, the public interest, and the civil liberties of public employees throughout the nation.

To ensure that this Court is fully aware of the gravity of this case, NCPFFA has prepared the accompanying amicus brief. NCPFFA and its counsel only learned of this case on November 13, 1989, some seven days before petitioners' brief was due. The time necessary for obtaining requisite approval and preparation of the accompanying brief unfortunately prevented its timely filing. Consent to file this brief from all of the parties was not obtained until November 17, 1989.

WHEREFORE, NCPFFA respectfully moves this Court for leave to file out of time the attached brief as amicus curiae.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

NCPFFA's interest is set forth in the foregoing motion for leave to file this brief and herein amplified.

STATEMENT OF THE CASE

NCPFFA adopts the statement of the case as presented by Petitioners.

SUMMARY OF ARGUMENT

Respondents' political patronage scheme is unconstitutional because it severely punishes applicants and employees for the exercise of their true political beliefs and associations. Respondents' scheme seeks to promote partisan objectives through direct coercion in employment practices which subverts the essence of the First Amendment.

ARGUMENT

I. THE NATURE OF RESPONDENTS' PATRONAGE SCHEME AND THE APPLICATION OF STRICT SCRUTINY COMPEL THE CONCLUSION THAT RESPONDENTS' SCHEME IS UNCONSTITUTIONAL

The fundamental issue before this Court is whether the First Amendment prohibits a governmental employer from using a rigid partisan political litmus test when hiring, promoting, transferring or recalling employees from layoff. May government condition hiring, promotion, transfer or recall from layoff upon direct political support, even including

financial contribution to a particular political party or candidate?

The pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions. Respondents' patronage system thrives on the raw exercise of party politics. This abusive exercise of political power is thrust into the mainstream of day-to-day jobs. Respondents' patronage plan pervasively affects the essential means of subsistence for substantial numbers of citizens. The logical conclusion of the Seventh Circuit's decision below will inject unnecessary and harmful partisan politics into the general day-to-day affairs of basic American public administration.

Respondents' patronage practices are tantamount to the loyalty oaths struck down by this Court in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Torcasco v. Watkins*, 367 U.S. 488 (1961). Respondents' patronage scheme is so explicit that it in effect requires a loyalty oath to the Republican Party in order to be hired, promoted, transferred or recalled from layoff. Respondents' employment policy is a relic of the past: to the victor goes the spoils. The occupational liberty interests of scores of citizens are trampled by Respondents' political pressure tactics.

In deciding these grave constitutional issues, this Court must employ its most strict and exacting scrutiny. In the precise context of patronage employment practices, this Court's seminal decision explained that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In *Elrod*, this Court explained that such a First Amendment "encroachment 'cannot be justified upon a mere showing of a legitimate state interest.'" *Id.* quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). "The interest advanced lust be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* This Court's recent cases have similarly held that governmental conduct must survive the most strict scrutiny where First Amendment

rights are at stake. *E.g., Eu v. San Francisco County Democratic National Commission*, 109 S.Ct. 1013, 1021 (1989) (compelling governmental interest is needed in order to burden free speech or association); *Hobie v. Unemployment Appeals Commission of Florida*, 107 S.Ct. 1046, 1049 (1987) (strict scrutiny applied; no compelling governmental interest established to override First Amendment protection). *Accord Shelton v. Tucker*, 364 U.S. 479, 485 (1960).

In *Elrod*, this Court enunciated the complete methodological analysis to be employed in assessing the constitutionality of patronage systems in employment. The government must utilize means closely drawn to avoid unnecessary abridgement of First Amendment rights. 427 U.S. at 362-63. It is not enough that that means chosen be rationally related. *Id.* at 362. If a less drastic means is available, the government may not choose a scheme that tramples First Amendment freedoms. *Id.* at 363. In essence, if a patronage employment system is to survive constitutional attack,

> it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. 427 U.S. at 363.

Applying the foregoing analysis to the case *sub judice* mandates a finding that Respondents' pervasive patronage scheme is unconstitutional. Justice Brennan's plurality opinion in *Elrod* thoroughly addressed the various alleged interests served by patronage. Here, the Seventh Circuit failed to heed the methodological analysis set forth in *Elrod* and its progeny. Rather than employing the strict scrutiny mandated by *Elrod* and other decisions of this Court, the Seventh Circuit erroneously reasoned instead that "courts must afford the political process and political institutions great deference." 868 F.2d at 953. This case does not involve some mere deference;

it involves the most rigid form of partisan litmus test. The Seventh Circuit erroneously relied upon other considerations in support of patronage which this Court flatly rejected in both *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980).

The fundamental interest served by Respondents' patronage scheme is the enhancement of political power and growth of the Republican Party. Patronage is a partisan rather than a governmental interest. Such partisan interests do not even constitute legitimate governmental interests much less the sort of "vital" government interest required to survive strict scrutiny. *Elrod*, 427 U.S. at 362-64. Patronage is not an appropriate means to implement a democratic mandate. *Id.* at 367-70. Nor does patronage further governmental efficiency, promote loyalty of employees or preserve the democratic process. *Id.* Rather, patronage "is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 357. Patronage employment practices are fundamentally at odds with traditionally accepted employment criteria of merit, qualifications, performance, and other factors reasonably related to the enhancement of productivity and efficiency. In *Elrod*, this Court flatly rejected the proposition that patronage promotes efficient government. "At all events, less drastic means for insuring government effectiveness and employee efficiency are available for the state." 427 U.S. at 366.

The Seventh Circuit relied upon the alleged historic use of patronage as "a longstanding feature of American politics." 868 F.2d at 947, 953. Sadly enough, other similar forms of invidious discrimination in employment, housing, land use, and other areas were accepted for years before this Court brought the injustice to an end. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954). In *Elrod* and *Branti*, this Court recognized the unconstitutionality and ill effects of patronage employment practices. Respondents would have this Court return to the days where "to the victor goes the spoils." First Amendment rights are not bartering tools for nepotism by

politicos. The whim of politicians cannot be allowed to abrogate the essence of the First Amendment.

II. THE FIRST AMENDMENT AND THE DOCTRINES IN *ELROD* AND *BRANTI* APPLY TO PROHIBIT HIRING, PROMOTION, TRANSFER AND RECALL FROM LAYOFF DUE TO POLITICAL PATRONAGE, AFFILIATION OR BELIEFS

As Senator Sam Ervin explained in his authoritative treatise: "First Amendment freedoms are often grossly abused." Ervin, *Preserving The Constitution* 210 (1984). This case demonstrates gross abuse, calling into question the essence of the First Amendment in the context of a modern political spoils system. The *en banc* decision of the Seventh Circuit below, 868 F.2d 943, enunciated an unworkable standard misconstruing the scope of this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980). As amply articulated by Judge Ripple in his dissenting opinions, the Seventh Circuit's approach "is simply a manifestation of its willingness to tolerate 'minor punishment' for the legitimate exercise of first amendment rights." *Rutan*, 868 F.2d at 959 (7th Cir. 1989) (en banc); 848 F.2d at 1412 (7th Cir. 1988).

A plethora of cases from this Court demonstrate the historical impropriety of the overt use of politics by governmental officials in everyday employment relations which do not involve senior policy makers. *E.g., West Va. Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein."); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose exclusion... is patently arbitrary or discriminatory.") This Court has

emphatically underscored the historic broad sweep of constitutional protection for public employees. *E.g., Wieman, 344 U.S. at 192; Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Rankin v. McPherson*, 483 U.S. 378 (1987).

The constitutional right to support a particular political party or candidate is firmly rooted in the American tradition. *E.g., Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1019-21 (1989); *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 548 (1986); *Elrod v. Burns*, 427 U.S. 347 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). This Court has similarly recognized that the First Amendment affords protection for *not* supporting a particular political party or candidate. *E.g., Hudson v. Chicago Teachers Union*, 475 U.S. 292 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 222, 230, 235-36 (1977); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987). This Court has firmly recognized the critical importance of safeguarding the constitutional rights of public employees and the severity of depriving citizens of the means of livelihood. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985); ("We have frequently recognized the severity of depriving a person of the means of livelihood."); *Green v. McElroy*, 360 U.S. 474 (1960). The First Amendment prohibits the overt use of partisan politics in the day-to-day administration of non-policymaking applicants and personnel.

III. APPLICANTS FOR PUBLIC EMPLOYMENT ARE PROTECTED FROM POLITICAL COERCION AND PATRONAGE IN HIRING

The Seventh Circuit's decision in the case *sub judice* runs afoul of this Courts' reasoning in *Elrod* and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, this Court reasoned that government:

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech... We have applied the principles regardless of the public employees' contractual or other claim to a job. 408 U.S. at 597.

In *Elrod*, this Court observed:

> in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the Court recognized again that the government could not *deny* employment because of previous membership in a particular party. 427 U.S. at 358 (emphasis added).

The Court's emphasis in *Elrod* upon the *denial* of employment as opposed to dismissal indicates that the *Elrod* principle applies to hiring. The trilogy of *Cafeteria Workers*, *Perry* and *Elrod* underscores the meaningful application of the First Amendment to both applicants and employees, regardless of the particular status of the person. One simply does not lose First Amendment protection based on some lack of status; all persons are protected in their freedom of political belief and association. *Accord United States v. Robel*, 389 U.S. 258 (1967) (membership in the communist party may not bar a

person from employment in defense establishments important to national security).

In *Branti*, this Court's analysis also provides that the First Amendment protects individuals from political coercion in "either the selection or retention" of public employees. 445 U.S. at 519 n. 14. The specific use of the phrase "selection or retention" compels the conclusion that *Branti* contemplated First Amendment protection in hiring and selection, particularly since Justice Powell specifically indicated that one can construe *Branti* to include patronage hiring. *Branti*, 445 U.S at 522 n. 2 (Powell, J., dissenting). Justice Powell also suggested in *Elrod* that a First Amendment claim may be more significant when the issue involves patronage hiring rather than dismissals. *Elrod*, 427 U.S. at 381 n. 4 (Powell, J., dissenting).

In *Branti*, this Court focused upon the prohibition of political coercion in the *selection* process on three separate occasions in a single footnote. 445 U.S. at 519 n. 14. There, this Court raised the most interesting argument: "By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?" *Id.* Most recently, in *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) and *Frazee v. Illinois Department of Employment Security*, 109 S.Ct. 1514 (1989), this Court reaffirmed the fundamental notion that an employment applicant enjoys First Amendment protection. *Accord Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (loyalty oath applicable to both applicants for employment and employees stricken). The Circuit Courts are in accord. *E.g., Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) (hiring or discharge may not be conditioned in a manner infringing on an employee's or applicant's rights of political association); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) ("A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment."); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir.

1987) (same); *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

A plethora of federal courts and commentators have consistently recognized that the First Amendment protects hiring as well as discharge. *E.g.*, Comment, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374, 1378 n. 23 (1987) (collecting cases and articles); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chicago L. Rev. 181, 195 n. 94, 200-01 (1982) (same); *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 552 (E.D.N.Y. 1977), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977) (denial of employment or promotion cannot be conditioned on making political contributions).

No First Amendment values inhere in the alleged distinction between discharge and failure to hire. The alleged distinction is merely a hyper-technical, formalistic distinction wholly unrelated to any principles of free speech or association. It is a distinction without substance. As this Court noted in *Elrod*, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." 427 U.S. at 359-60 n. 13.

IV. APPLICANTS FOR PUBLIC EMPLOYMENT ARE AFFORDED CONSTITUTIONAL PROTECTION FROM INVIDIOUS DISCRIMINATION

Numerous cases have recognized that failure to hire because of an impermissible reason contravenes the Fourteenth Amendment. *E.g., Hill v. Met. Atlanta Rapid Transit Auth.*, 841 F.2d 1533 (11th Cir. 1988) (failure to hire due to race); *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986) (same); *Van Houdnos v. Evans*, 807 F.2d 648 (7th Cir. 1986) (failure to hire due to sex). *Cf. Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988) (substantive due process contravened by

denying building permit due to political animus); *Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (same). In short, there are no legally significant distinctions between the constitutional rights of employees and job applicants. The First and Fourteenth Amendments prohibit invidious class based discrimination in all aspects of employment relations. There is simply no distinction justifying protection against discrimination by the Fourteenth Amendment while subverting the First Amendment interests to a substantially inferior position.

V. SUBSTANTIVE DUE PROCESS PRECLUDES THE DENIAL OF PUBLIC BENEFITS DUE TO POLITICAL ANIMUS

This Court has recently breathed new life into the doctrine of substantive due process. *E.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the touchstone of due process is the "protection of the individual against arbitrary action of government..."); *see id.* at 337-38 (Stevens, J., concurring); *United States v. Salerno*, 107 S.Ct. 2095, 2101 (1987) (shocks the conscience approach); *Federal Deposit Ins. Corp. v. Mallen*, 108 S.Ct. 1780, 1787 (1988) (Due Process Clause prohibits arbitrary governmental interference with private sector employment relation). *See* McGuinness, *The New Substantive Due Process: Theory, Proof & Damages*, 24 New England L. Rev. (forthcoming February 1990; analyzing contemporary substantive due process in numerous contexts including public employment). Throughout our history, this Court has continued to proclaim that there is no place in our constitutional system for the arbitrary or abusive exercise of governmental power. *E.g., Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 244 (1819); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power..."); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The circuit courts have taken the lead from this Court and have applied substantive due process prohibiting the denial or interference with public benefits because of political factors. *E.g., Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (interference with building permit process for partisan political reasons contravenes substantive due process); *Brady v. Colchester*, 863 F.2d 205, 216 (2nd Cir. 1988) (substantive due process precludes the denial of a building permit due to political animus).

These cases demonstrate that raw politics and patronage are impermissible considerations in governmental allocation of a variety of public benefits. Whether in land use, building permit disputes, licensing, or in public employment, partisan politics is inappropriate because it is wholly unrelated to the merits and without rational basis. Respondents' patronage scheme represents the most blatant form of arbitrary and capricious governmental action that is inherently repugnant to traditional American constitutional values.

CONCLUSION

For the foregoing reasons, Amicus Curiae NCPFFA respectfully requests that this Court reverse the decision of the Seventh Circuit and remand this case for trial.

Respectfully submitted,

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Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Respondents,

and

MARK FRECH, et al.,

Cross-Petitioners,

v.

CYNTHIA RUTAN, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PUERTO RICO

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December 18, 1989

PUBLISHING RESOURCES SAN JUAN, PUERTO RICO

62 pp

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICUS CURIAE COMMONWEALTH OF PUERTO RICO

The Puerto Rico Public Service Personnel Act, 3 L.P.R.A. §§1301-1431, establishes a broad base of merit-oriented civil service embracing the vast majority of public employees, but leaves room for some personnel actions based on political affiliation with regard to a fairly small number of positions (no more than 25 per agency) clas-

sified as confidential, a system similar to the Senior Executive Service for upper-level federal managers and professionals established by Title IV of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1154-79 (1978) (codified in scattered sections of 5 U.S.C. (1982)). Extension of the *Elrod-Branti* doctrine to all personnel actions based on political affiliation would wreck this system adopted by the Puerto Rico Legislature in view of local conditions to structure government employment in the public interest. Such extension would seriously impair responsible and efficient governance in Puerto Rico and remove vital decisions affecting the administration of the Commonwealth's personnel service system from the discretion of its legislative and executive officials, placing them in the hands of federal judges and juries.

INTRODUCTORY STATEMENT

Briefly stated, the facts are as follows: Plaintiffs are former and present State of Illinois employees who brought action against state government officials challenging the use of political considerations in hiring, rehiring, promoting, and transferring employees. According to their allegations, the public employer (1) failed to hire one of the applicants while other applicants affiliated with the Republican Party have been hired in positions for which he was qualified; (2) denied promotions or desired transfers to some of the plaintiffs due to their political affiliation; and (3) failed to rehire some of the plaintiffs due to their political affiliation. The district court dismissed the complaint in its entirety for failure to state a claim upon which relief can be granted.

On rehearing *en banc*, the Seventh Circuit held *First*, that the applicant for public employment who alleged that jobs were awarded to less qualified, but politically favored persons, did not state a claim because patronage hiring practices are not prohibited by the First Amendment under the *Elrod-Branti* doctrine; *Second*, that public employees who alleged that they were denied promotions that went to less qualified but politically favored persons or were denied a desired transfer for lack of Republican Party support, stated claims for violation of the First Amendment since it may appear after trial that the denial of promotion or transfer was the substantial equivalent of a dismissal; and *Third*, that failure to rehire after layoff does not in and of itself violate the rule enunciated in *Elrod-Branti*, because many laid off employees stand essentially in the position of new job applicants when they seek a position, but, if a formal or informal system exists for placing employees into other positions, or reinstating them to their jobs, failure to do so may be the substantial equivalent of a termination from employment. Therefore, the district court on remand must look at all the facts and circumstances to determine whether failure to rehire after layoff was substantially equivalent to a discharge.

In short, the Seventh Circuit ruled that patronage hiring practices are not prohibited under *Branti* and *Elrod*. To resolve the constitutionality of patronage decisions in situations involving denial of promotions, transfers and rehiring, and other practices that fall short of dismissal, the Seventh Circuit adopted "a substantial equivalent of dismissal standard" which "focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave

his job." *Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 950 (7th Cir. 1989).

Amicus respectfully urges the Court to affirm the Court of Appeals' decision in *Rutan* and to hold that the principle of *Elrod* and *Branti* is limited to an actual or threatened dismissal and to a constructive dismissal substantially equivalent to a discharge because a reasonable person in the employee's position would be forced to quit his job.

SUMMARY OF ARGUMENT

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Court curtailed the dismissal or threat of dismissal of existing employees because it "...inhibits... belief and association through the conditioning of public employment on political faith" and "...penalizes its exercise." At 357 and 359. In *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Court again only considered patronage discharges which have "...the inevitable tendency... to coerce employees into compromising their true beliefs." At 513.

The state's failure to hire an employee does not impose a comparable burden on First Amendment freedoms. Denial of one opportunity for compensation by failure to hire is not comparable to the disruption and hardship caused by an individual's loss of his only job. The applicant who is blocked by patronage is cut off from a relatively small segment of the entire job market. It is not the end of the world for him. There are other government entities to bid to, and private ones as well. It is not like losing his job which might well result in a protracted period of search following discharge and in a substantially less well-paid job thereby inhibiting government workers from taking political stands adverse to their superiors. An

applicant for government employment who fails to get a job due to his political affiliation undoubtedly suffers less psychological and financial pressure than an employee who has been fired and has lost his job.

Against any impairment of First Amendment interests resulting from patronage hiring, one must balance the state's interests. The prospect of employment is a significant incentive to political effort, contributing to improve the democratic process. In addition, opportunities to implement the administration's democratic mandate are enhanced significantly by patronage hiring. These are compelling state interests which outweigh the possible First Amendment impairment resulting from patronage hiring.

As noted in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 282-84 (1986), the pain to the individual from the loss of existing employment is much greater than the loss of one of a number of possible employment opportunities. On the other hand, the potential advantage to an effective and vigorous government of choosing sympathetic and enthusiastic employees is much greater than the gain from dismissal of existing employees who are subject to dismissal for deviations from satisfactory performance.

Public employees should have no constitutional claim for failure to be promoted, transferred or rehired for political reasons, unless such failure is substantially equivalent to dismissal. Real differences exist between dismissals and other patronage practices. Although favoring political supporters by promotions, transfers, or rehiring may have some negative effects on people who did not support the party in power, the burden imposed by such patronage practices is much less significant than losing a job. A public employee has a very important stake in his position with the government. His financial affairs and other obligations are arranged around settled expectations

that his job will continue. Thus the coercion and control that a public employer may exercise over an employee by dismissal or threat of termination is great. A failure to obtain a promotion, transfer or other employment benefit, imposes more limited burdens on First Amendment rights. Weighed against the needs of efficient government and the right of the electorate to designate the policies that will be carried out by elected officials, such burdens do not give rise to a constitutional claim.

In the absence of significant intrusion on First Amendment freedoms, and in view of the important state interests advanced by patronage practices that fall short of dismissal, this Court should not extend the *Elrod-Branti* principles beyond actual dismissals or constructive discharges. Removing patronage decisions on promotions, transfers, and the granting of other possible benefits from the discretion of legislative and executive officials, is not justified under the *Elrod-Branti* test of balancing the cost of patronage with the state interests in effective government. Such an extension would represent a significant intrusion into the area of local legislative and executive policies, seriously impair the functions of government in the Commonwealth, and in practice require federal judges to become arbiters and administrators of the Commonwealth civil service system.

ARGUMENT

In *Elrod*, the assessment of competing interests and formulation of a balancing rule that is the core of the Court's plurality opinion was expressly confined to patronage dismissals:

> "Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S., at 353.

The concurring justices that completed the majority also expressly disavowed any intention to set out a constitutional rule for other patronage practices. *Elrod*, 427 U.S. at 374. In *Branti* the majority opinion again explicitly confined its decision to the "...dismissal of public employees for partisan reasons." *Branti*, 445 U.S. at 513, note (7). This Court must now determine whether politically motivated hiring decisions in government employment, or for those already employed, adverse personnel actions that fall short of dismissal, also burden the rights of political association and belief in such manner, and without any legitimate state interest that would justify them, so as to rise to the level of a First Amendment infringement.

Elrod and *Branti* recognized that public employees' individual free speech and association interests have to be balanced with the collective interest, implemented by a freely chosen political administration, of giving effect to the electoral choices of the people. Thus not all politically motivated public personnel practices were considered banned by the First Amendment and indeed some were considered part and parcel of the democratic process. Justice Powell in his *Elrod* dissent aptly summarized the history of patronage in the American democratic system and its vital role in the partisan electoral process upon which said system is based. *Elrod*, 427 U.S. at 378-80. The confidential and policy making exceptions to the *Elrod-Branti* ban on political dismissals is a recognition of such realities. *Elrod*, 427 U.S. at 367.

The loss of a person's means of economic survival, his job, was considered in *Elrod* and *Branti* so vitally

important to most people as to justify the assumption that employees will refrain from political expressions and action in order not to lose their jobs. Such intrusion into First Amendment protected activity could only be permitted when the state showed an overriding interest in being able to implement electoral choices unhindered by unsympathetic employees. Such an overriding state interest, as indicated in the *Elrod-Branti* doctrine, requires a demonstration by the government that the nature of the job or position is so politically sensitive or confidential that partisan loyalty is an appropriate requirement for the job.

Loss of employment is such a radical alteration of a person's life that such an event was deemed enough to persuade most people to involuntarily change their politics or abstain from them. It is submitted that for those seeking employment, not being considered for one of a number of possible employment opportunities is considerably less disruptive, and for those already employed by the government, being the object of an adverse personnel action, but with the job itself still secure, is even less of a disruption. Therefore, the *Elrod-Branti* test of balancing the cost of patronage in the restraint it places on freedom of belief and associations (427 U.S. at 355) with the state interests in effective government (427 U.S. at 364) should tip the scales in favor of respondents on the two issues presented in this case.

A. Hiring

This Court has held that under the First Amendment, and the due process and equal protection components of the Fourteenth Amendment, no government, state or federal, can pass an over-broad and vague law or regulation permanently, automatically and arbitrarily barring persons of a particular political affiliation from ever holding

any position in government. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947); *Weiman* v. *Updegraff*, 344 U.S. 183, 191-92 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967). The issue posed in those cases is fundamentally different from patronage hiring because the electoral process in a democratic society precisely guarantees that no political party will perpetually hold power at all levels of government. In fact, political patronage itself will guarantee change because it promotes citizen participation in the electoral process.

In the context of racially discriminatory state procedures for the appointment of persons to public office in state agencies this Court has ruled in *Turner* v. *Fouche*, 396 U.S. 346, 362-63 (1970):

> "We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees."

The *Turner* decision, however, is not relevant to the present case because race as a qualifying criteria is a permanent, absolute disqualification that does not promote popular participation in the electoral process as does political patronage. In fact, the decline of political patronage systems in big cities has deprived minorities and the poor of opportunities for advancement and political participation. Piven, *Federal Policy and Urban Fiscal Strain*,

2 Yale L. & Policy Rev. 291, 302-11 (1984), cited in *Avery* v. *Jennings*, 786 F.2d 233, 236 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). Simply put, racially discriminatory criteria in government employment hiring procedures do not advance any collective interest that could ever justify the burden it imposes on constitutional values.

Conceding that the use of political criteria in the government employment hiring process can implicate some burden on First Amendment values, it is submitted that very strong state interests clearly outweigh any such burden that could be felt by one aspiring to a government job and, therefore, no infringement of the First Amendment should be found. All federal courts that have considered the issue have so determined. There are three reported federal cases directly on point as to the issue of political patronage hiring. The present case reported at 868 F.2d 943 (7th Cir. 1989) and two Sixth Circuit cases: *Avery* v. *Jennings*, *supra*, and *Messer* v. *Curci*, 881 F.2d 219 (6th Cir. 1989).

Similar considerations have led federal circuit courts to deny extension of the *Elrod-Branti* doctrine to claims by government contractors of political discrimination in the denial of new contracts. *LaFalce* v. *Houston*, 712 F.2d 292, 294 (7th Cir. 1983) *cert. denied*, 464 U.S. 1044 (1984). The same treatment has been given to claims of political discrimination in the termination of existing contracts or contractors' positions. *Horn* v. *Kean*, 796 F.2d 668 (3rd Cir. 1986); *Sweeney* v. *Bond*, 669 F.2d 542, 545-56 (8th Cir. 1982), *cert. denied*, sub nom. *Schenberg* v. *Bond*, 459 U.S. 878 (1982).

The common thread that runs through all these cases is that, in addition to the analysis of competing interests between efficient government and individual restraints on freedoms of belief and association, it would be unwise for

the federal judiciary to impose its particular solution to a long standing political controversy that is best left to the electoral process to resolve. The people of each state can decide through the competing forces of the electoral process what kind of civil service system they prefer. Through state laws they should be free to design a civil service system that permits or not the use of political affiliation considerations in the allocation of government jobs in whatever degree and level of employment they deem wise. Extending the vague and intractable *Elrod-Branti* patronage dismissal ban would weaken the most cherished First Amendment value, the right of the people to consider the alternatives and then choose for themselves the kind of government they think best suits their needs.

B. Adverse Personnel Actions Short of Dismissal

The raison d'être of the doctrine established in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Connick* v. *Myers*, 461 U.S. 138 (1983), *Rankin, et al.* v. *McPherson*, 483 U.S. 378 (1987), *Elrod* v. *Burns*, *supra*, and *Branti* v. *Finkel*, *supra*, is to protect the exercise of First Amendment rights by public employees by insulating them from dismissals motivated by his/her exercise of their expressive and/or associational rights, when such expressive and/or associational activities do not negatively affect legitimate interests of the public employer such as workplace discipline and efficiency (*Pickering*, *Connick* and *Rankin*) or the proper implementation of politically sensitive government programs and/or the integrity of politically sensitive confidential working relationships (*Elrod* and *Branti*). Thus, the employment relationship or status as an employee is what cannot be negatively affected by the public employer.

As we have already explained, the loss of a job has such great economic impact that an employee could reasonably be expected to abstain from exercising his expressive and associational rights in order to avoid a dismissal. Even considering the great importance of political patronage in the democratic process, the burden on First Amendment rights of ordinary employees produced by politically motivated dismissals is enough in magnitude to justify a finding of a constitutional infringement. But an adverse personnel action short of dismissal, even though motivated by political reasons, does not produce a burden on expressive and associational activities of the employee of such magnitude as to justify a finding of a First Amendment infringement.

Such personnel actions, as for example, denial of a promotion or of a desired transfer, alteration or change of duties within the general competence of the position held, and others of similar nature, when the present job or employment remains secure, is so significantly less coercive and disruptive than a dismissal or threat of dismissal that an extension of the *Elrod-Branti* rule to them is not justified. An employee, with his present job secure, is less likely to change his political associations or abstain from them, because his job advancement opportunities are now diminished or his job situation is now less desirable than when his partisans were in charge.

As indicated in *Delong* v. *United States*, 621 F.2d 618 (4th Cir. 1980), when the *Elrod-Branti* principle "...is applied to patronage practices other than dismissal, it is rightly confined to those that can be determined to be the substantial equivalent of dismissal... In applying the principles, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount to outright dismissal." At 624. This is undoubtedly a rational and sensible test. Limiting the *Elrod-Branti* rule to actual dismissals or threats of dismissals and constructive discharges will provide reasonable protection to First Amendment values without unduly interfering with the state political process. Extending the *Elrod-Branti* doctrine to all adverse personnel actions will severely interfere with the management of state public personnel matters and place an intolerable burden on the federal courts.

There are multiple governmental interests and purposes totally independent of partisan concerns that could be affected if routinary personnel decisions and actions were to be subject to judicial scrutiny for possible political motivations which in some instances may be inextricably mingled with legitimate motives. In many occasions incoming supervisory officials will want to make good faith changes related to the employees' circumstances, in order to improve efficiency, implement their own policies and even correct what they perceive as past mistakes or illegalities. Many times the underlying rationale will be a subjective impression on how the office would run better. Political opponents are more likely to resist these changes and perceive them as adverse to their interest in preserving the previous status. However legitimately and sincerely justified the contemplated changes may be, due to this circumstantial or incidental effect on the interests of political adversaries, the incoming officer would risk facing numerous judicial complaints and having to prove objective rationales to defend himself from imputations of political motivation.

Likewise, the possibility that non-partisan efforts to maintain discipline and loyalty will bring about personal clashes with political adversaries and result in lawsuits will have a dampening effect on the state officials' right to take measures to that end. They would feel constrained to avoid animosity or strained relationships with adversaries or non-partisans and even the use of any language or expressions to which political undertones may be ascribed. Efficiency in the provision of government services will be negatively affected.

The *Delong* and *Rutan* decisions represent the wisest course of action and this Court should adopt their position on this matter. The constructive dismissal rule, which has been well developed in other employment law contexts by both federal and state courts, protects both public employees' and employers' interests in the employment relationship. The employee is protected from abusive working conditions designed to obtain indirectly for the employer what is barred to it from doing directly (dismissing the employee for a legally prohibited reason or motive). On the other hand, said doctrine protects the employer's legitimate interest in the efficient administration of the workplace by rejecting or not recognizing disruptive, exaggerated, selfish or purely personally convenient employee demands regarding job conditions and workplace organization.

It is proposed that this Court adopt the constructive dismissal rule with the following guidelines to be uniformly applied: First, the personnel actions necessary to bring into action the First Amendment protections must radically change the basic elements of the employment relationship to such a negative or adverse degree that any reasonable person will be justified in concluding that the changes are intended to force the employee to resign.

Second, in the process of evaluating the reasonableness of the employee's conclusion as to the intolerability of the changes in the working conditions, an objective standard must be used which measures the employee's expectations in the context of the particular job position in question, the applicable statutes and administrative regulations and the prior practices and usages of the workplace.

Third, when in effect a constructive dismissal situation has been created by the public employer, the employee does not have to resign in order to be able to claim his rights because such situation is the same as a threat of dismissal expressly articulated by the employer as in the *Elrod* case.

Fourth, if the elements above mentioned are established, thus proving a constructive dismissal of the plaintiff, then plaintiff must show that said action was taken because of the employee's political beliefs and affiliations.

Fifth, once all the aforementioned elements are proven then the case proceeds, guided by the *Elrod-Branti* rules used for express dismissal situations. For example, if a demotion with a transfer and a pay cut were to be adjudged as a constructive dismissal, and the plaintiff proves that said action was taken because of his political affiliation, the public employer could still prove that the nature of the employee's former position (the one from which he/she was demoted) was such in terms of the policy making-confidential duties test that political considerations could be an appropriate criteria for the changes made in plaintiff's working conditions.

The solutions herein proposed for the two basic issues posed for review in this case will implement the values protected by the First Amendment and also recog-

nize the state's authority to administer its agencies and departments with the least possible intervention by the federal courts. Those who are employees will be protected as to the basic elements of their employment relationship or status. The state, however, is given sufficient leeway to hire its workers and organize the public workplace according to its views and policies of how a particular agency or department should function. The wisdom of such workplace personnel hiring and organizational policies and their impact upon the populace served by state governments should not be judged by the federal courts, but by the people through the electoral process.

The First Circuit's *en banc* decision in *Agosto de Feliciano* v. *Aponte Roque* (No. 86-1300) and two other related cases (Nos. 86-1643 and 86-1644) entered on December 8, 1989 summarily rejects the constructive discharge standard.[1] It sets forth a new "unreasonably inferior" test for determining "whether and under what circumstances public employer action, short of dismissal, adversely affecting a career employee, based solely on the latter's political affiliation, should be held to violate the First Amendment right of free association." Appendix, A-10.

The main reason advanced for rejecting the constructive discharge norm adopted in ***Rutan*** and ***Delong*** is that "...if we used such a standard, we would be holding that an employee's First Amendment right is significantly bur-

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[1] The opinions rendered by the First Circuit have not yet been published. The majority opinion was written by Senior Circuit Judge Coffin. Two concurring opinions were filed by Chief Judge Campbell and Judge Breyer, who also dissented in one of the three cases decided by the Court of Appeals. Judge Torruella filed a dissenting opinion. The various opinions are printed in the appendix to this amicus brief.

dened only when he or she has, in effect, been fired for the exercise of that right." Appendix, A-17. It is well established, however, that when a constructive dismissal situation has been created by the employer, the employee need not resign in order to claim his rights. The situation would be analogous to a threat of dismissal expressly articulated by the employer. Moreover, as Chief Judge Campbell in his concurring opinion points out, the "unreasonably inferior" standard does not adequately protect the government's interests in "making needed reorganizations and personnel shifts" and therefore "...the voters' mandate for change may go unheeded." Appendix, A-30. The "doubts" expressed by Judge Breyer in his concurrence emphasize the dangers of the position adopted by the First Circuit. Amicus joins Chief Judge Campbell in his "hope" that "...th[is] Court will decide *against* allowing state employees to sue for job changes that fall short of actual or constructive discharges." Appendix, A-30.

CONCLUSION

This Court should affirm the Seventh Circuit's decision in *Rutan* and hold that the principle of *Elrod* and *Branti* is limited to actual, threatened or constructive dismissals.

Respectfully submitted,

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December 18, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1300

MARIA M. AGOSTO DE FELICIANO, ET AL.,
Plaintiffs, Appellees,

v.

AWILDA APONTE ROQUE, ETC., ET AL.,
Defendants, Appellants.

No. 86-1643

MARIA TERESA TORRES HERNANDEZ, ET AL.,
Plaintiffs, Appellees,

v.

PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellants.

No. 86-1644

MARIA TERESA TORRES HERNANDEZ,
Plaintiff, Appellant,

v.

PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: December 8, 1989

These causes came on to be reheard on petition for rehearing en banc.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgments of the district court are vacated and the cases are remanded to the district court for further proceedings consistent with the opinion filed this date.

No costs.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1300
MARIA M. AGOSTO-DE-FELICIANO, ET AL.,
Plaintiffs, Appellees,
v.
AWILDA APONTE-ROQUE, ETC., ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

No. 86-1643
MARIA TERESA TORRES-HERNANDEZ, ET AL.,
Plaintiffs, Appellees,
v.
PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellants.

No. 86-1644
MARIA TERESA TORRES-HERNANDEZ,
Plaintiff, Appellant,
v.
PEDRO A. PADILLA, ETC., ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Juan M. Perez-Gimenez, Jr., *U.S. District Judge*]

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella and Selya,
Circuit Judges.

Jose Hamid Rivera with whom *Saldana, Rey, Moran & Alvarado*, *Hon. Hector Rivera Cruz*, Secretary of Justice, and *Hon. Rafael Ortiz Carrion*, Solicitor General, were on supplemental brief for appellant Awilda Aponte-Roque.

Pedro Juan Perez Nieves with whom *Saldana, Rey, Moran & Alvarado, Hon. Hector Rivera Cruz*, Secretary of Justice, and *Hon. Rafael Ortiz Carrion,* Solicitor General, were on supplemental brief for Pedro A. Padilla, et al.

Pedro Mirando Corrada with whom *Hector Urgell Cuebas* and *Jose Roberto Feijoo* were on supplemental brief for appellees Maria M. Agosto-De-Feliciano, et al.

Eliezer Aldarondo Ortiz, Miguel Pagan and *Aldarondo & Lopez Bras* on supplemental brief for Maria Teresa Torres-Hernandez.

DECEMBER 8, 1989

OPINION EN BANC

COFFIN, *Senior Circuit Judge*. Panel decisions in these two cases were withdrawn and both cases were reheard en banc. The issues common to both are whether and under what standards the protections of *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), should be available to government employees whose employment, while not terminated, was subjected to less advantageous conditions and responsibilities because of the employees' political affiliation. We convey our views on those legal questions here, and remand for application of the standard to the particular facts of each case.

These cases represent a second wave in a tide of litigation arising out of changes in political administrations in Puerto Rico. The first wave involved outright

dismissals and has produced a substantial number of opinions[1]. In all of these our task was to determine, in accordance with both *Elrod* and *Branti*, (1) whether the agency in which a discharged plaintiff had served was engaged in activity whose direction or pace properly could be affected by partisan political considerations, and (2) whether the particular position of the plaintiff was a policymaking or confidential one. On the basis of these criteria, we considered whether the plaintiff's job was protected against politically motivated discharge. Here the plaintiffs have protected status, and they have not been discharged; the question at issue is what type of employer action short of dismissal will support a claim for violation of the plaintiffs' right of free political association.

[1] *See, e.g., Figueroa Rodriguez* v. *Lopez Rivera*, 878 F.2d 1478 (en banc) (1st Cir. 1989); *Caro* v. *Aponte Roque*, 878 F.2d 1 (1st Cir. 1989); *Cordero* v. *DeJesus-Mendez*, 867 F.2d 1 (1st Cir. 1989); *Rodriguez Burgos* v. *Electric Energy Authority*, 853 F.2d 31 (1st Cir. 1988); *Estrada Izquierdo* v. *Aponte Roque*, 850 F.2d 10 (1st Cir. 1988); *Hernandez-Tirado* v. *Artau*, 835 F.2d 377 (1st Cir. 1987); *Morales Morales* v. *Arias*, 834 F.2d 255 (1st Cir. 1987); *Nunez* v. *Izquierdo-Mora*, 834 F.2d 19 (1st Cir. 1987); *Zayas-Rodriguez* v. *Hernandez*, 830 F.2d 1 (1st Cir. 1987); *Vazquez Rios* v. *Hernandez Colon*, 819 F.2d 319 (1st Cir. 1987); *Perez Quintana* v. *Gracia Anselmi*, 817 F.2d 891 (1st Cir. 1987); *Raffucci Alvarado* v. *Zayas*, 816 F.2d 818 (1st Cir. 1987); *Rosado* v. *Zayas*, 813 F.2d 1263 (1st Cir. 1987); *Mendez-Palou* v. *Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987); *Monge-Vazquez* v. *Rohena-Betancourt*, 813 F.2d 22 (1st Cir. 1987); *Cheveras Pacheco* v. *Rivera Gonzalez*, 809 F.2d 125 (1st Cir. 1987); *Rodriguez Rodriguez* v. *Munoz Munoz*, 808 F.2d 138 (1st Cir. 1986); *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (en banc); *De-Choudens* v. *Government Development Bank of Puerto Rico*, 801 F.2d 5 (1st Cir. 1986) (en banc); *De Abadia* v. *Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986).

I. *Facts* [2]

In November 1984, the Popular Democratic Party (PDP) won the gubernatorial election in Puerto Rico. Defendant Awilda Aponte Roque, a member of the PDP, was then named Secretary of the Department of Public Education. Aponte in turn named defendant Maria P. Scott as director of the Department's Humacao Region. Plaintiffs, all members of the New Progressive Party (NPP), are officials in the Humacao Region and have been "career" employees with the Department for more than twenty years.[3]

Plaintiffs' action under 28 U.S.C. § 1983 alleges that political discrimination resulted in a drastic change and reduction of their duties, and that this violated the First and Fourteenth Amendments of the Constitution. The relevant testimony in their jury-waived trial may be summarized as follows. Defendant Scott assumed office on January 14, 1985. Within four days, without having met with any of the plaintiffs, including Maria Agosto de Feliciano, her immediate subordinate, and without having developed any clear reorganization plan, she issued a memorandum setting forth new "guidelines for the Department." These removed responsibilities from plain-

[2] We detail here the facts in *Agosto de Feliciano* v. *Aponte Roque*, No. 86-1300, to provide context for the legal issues we decide herein. We see no need to present as well the factual background of *Torres Hernandez* v. *Padilla*, Nos. 86-1643 and 86-1644, which involves only one additional plaintiff.

[3] A career employee under Puerto Rico's civil service personnel system is selected strictly on merit and can be removed only for cause. Puerto Rico Public Service Personnel Act of 1975, 3 L.P.R.A. §§ 1301, 1331-1338. In contrast, confidential employees under the Act are of "free selection and removal," and are those who "intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency . . . ." *Id.* at §§ 1350 and 1350(4).

tiffs, and required plaintiffs to obtain approval for their work from other employees who were PDP members and who previously had held positions subordinate to plaintiffs. Phone calls, mimeographing, photocopying and typing were to be similarly authorized.

According to several plaintiffs, defendant Scott explained that her actions stemmed from the recent political change. When plaintiffs wished to meet with her to discuss their problems, she insisted upon including her "confidence group" — PDP members who previously had been subordinate to plaintiffs. Plaintiffs twice complained by letter to defendant Aponte of being deprived of some of their functions, which had been reassigned to lower level personnel, and of their inability to communicate with defendant Scott. Aponte's only response was to indicate that she was referring the matter to Scott.

We now summarize the evidence with regard to the specific changes in the plaintiffs' responsibilities:

Maria Agosto de Feliciano. Her prior job description consisted of some 26 responsibilities. Although the list appears somewhat inflated by bureaucratic jargon, it is nonetheless obvious that as the Assistant Regional Director she had varied supervisory and other responsibilities, including representation of the regional director in all activities in which the director is unable to participate. She also was in charge of the office in the regional director's absence. After defendant Scott's arrival on the scene, Agosto's duties were confined to the special education program and to signing checks. She no longer oversaw general supervisors.

Virginia Diaz Diaz. She served as liaison between the Department of Public Education and private schools, coordinated the teaching practice program in the Project School without grades, and directed a regionwide commit-

tee on school organizations. After defendant Scott's arrival, she continued to work with schools without grades and private schools, but no longer directed the school organizations committee. In addition, she had to ask defendant Scott or Scott's secretary for permission to use a telephone, to make photocopies, or to have typing done.

Luz Camacho de Ortiz. Her prior list of responsibilities included some 23 items, ranging from surveying needs, developing work plans, and evaluating curricula and training, to managing vocational education and supervising student organizations. After defendant Scott's arrival, she was deprived of her former supervisory duties and had the sole functions of working in connection with talented students and of supervising an elementary school science program for which she had inadequate background.

Vincente Vasquez Castro. His prior job description included 21 items of rather broad responsibilities in the areas of vocational education and student services. Evaluation of personnel, curriculum revision, budget distribution, development of new techniques, and oversight of programs relating to school needs, transportation, and scholarship were some of them. After defendant Scott's arrival, he no longer supervised; such responsibilities were assigned to a former subordinate, a PDP member. Vasquez's sole function was partial responsibility for the school transportation program.[4]

Defendants advanced several arguments to the district court. They challenged the contention that the changes in plaintiffs' duties were politically motivated, asserting that their knowledge of plaintiffs' political affiliation was evidenced only by plaintiffs' self-serving testimony. Defendant Scott testified that the jobs held by plaintiffs had always been subject to reshaping and reassignment of duties by her predecessors, that plaintiffs' remaining responsibilities were indeed substantial ones, and that she was in the midst of a process of determining the needs of her region and, when a complete analysis had been made, she would begin "adding functions pertinent to the position[s]."

[4] The fifth plaintiff, Vega Diaz, was found by the district court not to have established in sufficient detail the tasks assigned to him before and after the change of government and, therefore, "failed to prove that there had been substantial changes in his tasks . . . or that the same were changed to tasks of lesser category." No appeal was taken from this holding.

The district court held that plaintiffs had established a prima facie case of political discrimination and that the defendants had not submitted a "credible justification." It granted an injunction reinstating plaintiffs to their former duties. It observed that neither defendant had raised the defense of qualified immunity, and awarded, against both defendants, compensatory damages for emotional and mental distress in the amount of $60,000 for each plaintiff, and punitive damages in the same amount for each plaintiff.

Defendants filed this appeal, making the following arguments: 1) plaintiffs have no cause of action under the First or Fourteenth Amendments; 2) defendants are entitled to qualified immunity; 3) the district court's findings of fact are erroneous; 4) the award of damages is excessive; and 5) the injunctive relief is overly broad.

II. *A Legal Standard for Adjudicating Allegedly Partisan Reallocation of Duties and Changes in Working Conditions of Civil Service Employees*

A.

The difficulties in determining whether a government employee is protected from a politically motivated dis-

charge are considerable. *See* cases listed in note 1. As the facts of *Agosto de Feliciano* v. *Aponte Roque* illustrate all too well, however, the difficulties facing courts in cases involving employer action less final and definitive than dismissal are potentially enormous. They arise from the need to sift out the chaff of minor irritants and frustrations from the wheat of truly significant adverse actions.

The major issues presented in these cases are whether and under what circumstances public employer action short of dismissal, adversely affecting a career employee, based solely on the latter's political affiliation, should be held to violate the First Amendment right of free association. By definition, we no longer have the bright line threshold of dismissal present in *Elrod* and *Branti*. Our search for workable standards promises to be difficult. Indeed, Justice Powell in his dissenting opinion in *Elrod* speculated that "[t]he difficulty of formulating standards might pose a bar to judicial review of some patronage practices not before us." 427 U.S. at 377 n.1.

Other circuits have resolved these issues in widely diverging manners. The Second and Third Circuits have adopted a rather wide-open approach. *See Lieberman* v. *Reisman*, 857 F.2d 896, 900 (2d Cir. 1988) ("Whenever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis* v. *Gable*, 823 F.2d 723, 731 (3d Cir. 1987) ("the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech"). *See also* Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181 (1982) (arguing that all politically inspired adverse personnel actions, whether or not equivalent in severity to dismissal, are

unconstitutional). The Seventh and Fourth Circuits have been more restrictive. *See Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989) (to be actionable, adverse personnel moves must amount to the "substantial equivalent [of] a dismissal"); *Delong* v. *United States*, 621 F.2d 618, 623-24 (4th Cir. 1980) (similar). *But see Pieczynski* v. *Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) ("Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs.")

In any event, our starting point must be *Elrod* and *Branti*. We discern several teachings, either explicit or implicit, in those decisions. First, the holdings were explicitly confined to patronage dismissal cases. Justice Stewart, his concurrence necessary to form a majority in *Elrod*, made it clear that "the broad contours of the so-called patronage system, with all its variations and permutations," were not being considered. 427 U.S. at 374. We therefore realize that, in dealing with something less definitive than dismissals, we enter a field yet unploughed by the Court.

Second, notwithstanding the limited scope of the Court's holdings, they imply applicability of the First Amendment protection to some patronage employment decisions short of dismissal. We say this because of the Court's references to "political belief and association" as being "the core of those activities protected by the First Amendment." *See, e.g., Elrod,* 427 U.S. at 356. Expanding on this theme, the plurality in *Elrod* quotes, with the endorsement of Justice Stewart, the sweeping language of *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972): " '[I]f the government could deny a benefit to a person because of

his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.' " 427 U.S. at 359, 375. This language also found favor with the majority in *Branti*. 445 U.S. at 515. In addition, we attach some significance to the fact that the Court in *Branti* saw fit to quote the district court's explanation, accompanying its injunction prohibiting termination of plaintiff's employment, that "[m]ere payment of plaintiff's salary will not constitute full compliance...," 445 U.S. at 509 n.3.

Third, our resolution of the basic questions in these cases must recognize that there are First Amendment interests on both sides. As the Court in *Elrod* stated, "It is apparent that at bottom we are required to engage in the resolution of conflicting interests under the First Amendment." 427 U.S. at 371. The First Amendment interest at stake on the government's side that seemed to weigh most heavily in the Court's analysis was "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate," *id*. at 367, or alternatively, the "need to insure that policies which the electorate has sanctioned are effectively implemented," *id* at 372. Although this interest is not sufficient "to validate patronage wholesale," it is "not without force." *Id*. at 367.

B.

What we draw from these teachings is that our task is to devise a standard for evaluating employee burdens that protects against at least some politically motivated actions short of discharge, but that also gives due breadth to the government's interest in the effective implementation of its policies. In searching for such a standard, we first

consider what level of generality is most fitting. The choices, broadly speaking, are whether to apply categorical definitions as in *Elrod* and *Branti*,[5] or to engage in very fact-specific and ad hoc analysis of the interests of an employee, the extent to which those interests have been adversely affected by a government decision, and the particular needs of government. The latter approach has been adopted by the Supreme Court in cases where employees have been dismissed in retaliation for speech activity. *See, e.g., Rankin* v. *McPherson*, 483 U.S. 378 (1987); *Connick* v. *Myers*, 461 U.S. 138 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). This approach is well adapted to cases involving expression by public employees, for the form, content, manner, time, and place of expression can be definitely varied, as can be the circumstances bearing on the employer's legitimate needs. *See* Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Colum. L. Rev. 558, 567 (1985).

We believe a categorical approach is appropriate here, although it is not so obvious a choice as in *Elrod* and *Branti*. In those cases, there were fewer variables; the employer action at issue always was a discharge. In the cases we now consider, however, we face a virtually infinite number of possible employer actions that will fall along a wide spectrum of severity. The employer's interest

[5] Categorical analysis involves development of a general standard separating protected from unprotected activity that can be applied to every case. In *Elrod* and *Branti*, the Court established that employees whose jobs were categorized as policymaking, confidential, or communicative were not protected from political discharge, so long as party affiliation is an appropriate requirement for the position. *See Elrod*, 427 U.S. at 367-68, 375; *Branti*, 445 U.S. at 517-18; *Jimenez Fuentes*, 807 F.2d at 242. The Court also assumed that discharges of such individuals would be justified in light of the new administration's interests, and did not require ad hoc scrutiny of the weight of the government's interest in any particular case.

in taking politically motivated action also will vary significantly because the jobs at issue will range from those falling just outside the core political positions excepted from the *Elrod-Branti* protection to those with far more remote links to the political process.[6] We could, therefore, attempt to weigh the impact on the employee against the government's interest in each case, constructing a kind of sliding scale of protection from political harassment.

We decline to do so not only because such a procedure seems overwhelming in light of the many possible combinations of factors, but also because we believe there are strong reasons for adopting a categorical cutoff point of severity of harm below which actions simply should not be considered a constitutionally significant burden on the employee's political association right.[7]

First, if the threshold for an actionable constitutional violation were low, we believe employees would too often resort to litigation when the employer's action was actually apolitical in nature. All employees, regardless of politics, may face a variety of lesser aggravations and inconveniences in the workplace, and a common

[6] As did the Supreme Court in *Elrod* and *Branti*, we assume here that the employee's interest in free political association and the administration's interest in the effective implementation of the electorate's preferred political policies are substantial. *Elrod* and *Branti* tell us, however, that when the administration's interest is at its highest point, it outweighs the individual's right to be free from political pressure. Thus, an employee in a policymaking position may be discharged solely on the basis of political affiliation.

[7] Our reference to a "categorical" approach does not mean that the trial court would be freed from a detailed inquiry into what happened to the employee and why the government took the actions it did. Rather, once the court has found the facts, it will look at whether the employee has met the standard we set today for proving an actionable First Amendment violation. This is categorical in the sense that the factfinder will be required to apply the standard and will not be free simply to balance the interests at stake in the individual case.

catalogue of such non-political grievances — such as feelings of insufficient autonomy, complaints about unpleasant new duties, or restricted access to the telephone — could all too easily, and incorrectly, be ascribed to partisan political motivation. Although the government employer could be expected to prevail in cases where there was no political motivation for the actions, we should discourage employees from drawing the courts into the day-to-day operations of government.

Second, unlike in *Rankin*, *Connick* and *Pickering*, where the public employer's asserted interest was in efficiency, the government's competing interest in a political patronage case also is based in the First Amendment. *See Elrod*, 427 U.S. at 371 (recognizing administration's interest in the effective implementation of political policies that presumably were sanctioned by the electorate). This interest would be undervalued if administrations could be forced to defend in court every decision to adopt new procedures, to create new organizational structures, and to reallocate functions. Thus, again, while the government could be expected to prevail when it takes actions in furtherance of its interest, and should lose when the only motive is to reward or punish political friends or foes, we should seek a method for resolving valid complaints that will avoid excessive court intervention by giving some breathing room to legitimate efforts to make good on promises to the electorate.

Third, we believe that even some politically motivated interactions between high-level policymakers and protected civil service employees should not trigger a constitutional cause of action. These less serious occurrences — social preference or pressure, nuances affecting status and prestige, and articulated or indirectly manifested slurs and gibes — may be an all too real by-

product of our long-standing organization of political life into two or more parties. *See Bart* v. *Telford*, 677 F.2d 622, 625 (7th Cir. 1982). We believe it appropriate to require the citizen who believes and affiliates with a political party to develop a suitably thick skin to withstand the rigors of our societal, often highly politicized, life.

In short, these factors suggest that insubstantial changes in an employee's work conditions and responsibilities, even when politically motivated, either would not reasonably chill the employee's exercise of the right to free political association, or would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest in implementing new policies. We therefore believe our task is to develop a general standard that would at the same time protect the rights of political belief and association against real and substantial assaults, and yet also protect a government from a legal battle over every move it makes to implement its policies. We believe this balance is reached, and a cause of action for violation of the employee's free association right therefore stated, only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party.

C.

We thus turn to our primary task, the creation of a workable standard for recognizing a violation of a civil servant's freedom of association. We have pondered and labored at length in an effort to define this constitutional violation in a way that will neither unduly strain governments with harassing lawsuits nor unduly discourage employees with formidable complaints from asserting their rights. We have found that no simple catch phrase

suffices to meet these dual goals. In particular, we have rejected as unhelpful the "constructive discharge" or "tantamount to dismissal" formula adopted by at least two other circuits. *See Rutan*, 868 F.2d at 949-51; *Delong*, 621 F.2d at 623-24. If we used such a standard, we would be holding that an employee's First Amendment right is significantly burdened only when he or she has, in effect, been fired for the exercise of that right. But comparing what happened to an employee in this context with the repercussions of discharge risks undervaluing the employee's right. Pension rights, seniority, fringe benefits, and the security represented by government employment all may be retained in these cases — as they were in the instant one — because the plaintiffs nominally may continue to hold the same jobs they previously had held. Moreover, many of the employees involved in such cases would be likely to endure severe hardship before contemplating resignation. In the case of a senior civil servant, for example, mobility is likely to be extremely limited and only rather cataclysmic changes could reasonably induce one to quit. To link a constitutional violation to a finding of "constructive discharge," or to conditions "tantamount to dismissal," may therefore allow an impermissibly high burden on the free exercise of the political association right. Thus, we think it ill-advised to adopt this short-hand method of describing the burden that we believe is sufficient to state a cause of action for violation of an employee's free association right.

We also have rejected as insufficiently revealing the tag "constructive demotion," although we note that the results of the standard we are about to describe would, in many respects, mirror those of a constructive demotion analysis. We nevertheless decline to adopt the short-hand phrase because when a bureaucrat is denied respon-

sibilities and perquisites appropriate to the position occupied, it does not necessarily mean that he or she has been accorded those appropriate to a lower level. In our view, a "constructive demotion" inquiry would simply obfuscate matters by raising the distracting question of the level to which the plaintiff has descended.[8]

We have, however, found instructive a precedent of our own that is repeatedly cited for its discussion of "constructive discharge," *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114 (1977). That case has guided us not by its "tantamount to dismissal" standard but by two aspects of its methodology: first, the technique of canvassing specific injuries to evaluate the severity of the change wrought in the plaintiff's employment position, and second, judging the change against a standard that asks whether the new work situation is "unreasonably inferior to his prior position." In *Alicea Rosado*, we found no constructive discharge because the duties of the transferred plaintiff remained appropriate for his rank, even though he was no longer in charge of an office. Although this meant a "limited blow to [his] pride," 562 F.2d at 119, and the transfer would have increased his unreimbursed commuting costs, we concluded that "[a] more drastic reduction in the quality of working conditions [would be] needed," *id.* at 120, to constitute a constructive discharge.

We conclude that a similar technique, and a similar standard of severity of harm, are appropriate here, where our goal is to determine whether the new work conditions would place substantial pressure on even one of thick skin to conform to the prevailing political view. This level of

[8] We have treated outright demotions, which involve reductions in pay and official rank, as equivalent to discharges. *See, e.g., Gierbolini Colon* v. *Aponte Roque*, 848 F.2d 331, 333 & n.2 (1st Cir. 1988).

burden is reached, we believe, when the employer's challenged actions result in a work situation "unreasonably inferior" to the norm for the position. To determine whether such a reduction has occurred — in other words, to evaluate whether the changes were sufficiently severe to warrant the "unreasonably inferior" description — the factfinder should canvass the specific ways in which the plaintiff's job has changed. Because we recognize that the "unreasonably inferior" standard is not self-defining, and could be subject to widely varying interpretations, we offer below some guidelines for judging severity. These are, of course, not prescriptive, but are designed to demonstrate the severity of change necessary to constitute a violation. We are well aware of the impossibility of devising detailed prescriptions that would cover future cases. We therefore caution that the suggested results in the following illustrations might well be altered by even slight factual variations.

1. An employee who has lost merely the "perks" of this position — for example, the best office or secretary in the agency, unlimited telephone access or unusually minimal oversight — would not meet the "unreasonably inferior" standard.

2. An employee whose job has been substantially narrowed — perhaps reduced from manager of five departments to two — but who retains supervisory authority over matters of comparable significance to those taken away would not meet the "unreasonably inferior" standard.

3. An employee who previously had predominantly exciting and responsible work and who was left with only a few routine and technical assignments could be found to meet the standard

so long as his prior duties reflected the usual nature of his position rather than his prior high status as a member of the then-prevailing party. For example, if an assistant to the director of an agency typically has no supervisory authority, but the potential plaintiff who is in that job had supervisory status under the last director *because he was a political ally of that director* or because he had some other idiosyncratic *nonpolitical* relationship (say, friendship or "golfing buddy" status) with his superior, a reduction of the employee's role to the norm would not give rise to a violation. On the other hand, if the assistant to the director traditionally has run the office in the director's absence, and the new director now assigns this task — and others of responsibility — to someone who is the plaintiff's subordinate, a factfinder would be entitled to term the new job conditions "unreasonably inferior."

4. An employee whose job functions remain largely the same, but who is excluded from policymaking sessions that he or she once attended would not meet the "reasonably inferior" standard. Such a person, whose duties are not politically sensitive enough to allow a patronage dismissal, may nevertheless as a party confidante have been invited to contribute ideas and advice to those in policymaking positions. The new administration need not extend similar invitations to those who do not share its political outlook.

5. An employee who had been a supervisor and had worked independently in designing the projects necessary to carry out her duties and

who lost only the freedom to work independently — instead being required to report regularly on her work — would not meet the standard. Similarly, if the employee lost her supervisory role but continued to work independently on projects of significance, she would be unlikely to meet the standard unless the supervisory part of her job had been its defining characteristic.

If, however, that same employee lost both her supervisory status and her independence, in all likelihood the factfinder would be entitled to conclude that she met the standard. The decision would turn, however, on such factors as whether the supervisory role had been a primary part of her job, whether the duties she retained were challenging and significant, and whether new and inferior working conditions accompanied the change in duties (e.g., lost access to telephone and photocopier, poorer office accoutrements, worse hours).

6. An employee who is given one or two short-term assignments that are below his rank probably would not meet the standard of severity. In general, an employee must show a permanent, or at least sustained, worsening of conditions to reach the threshold of constitutional injury. If, however, a temporary change in duties is so inappropriate as to be demeaning and persists for longer than a week or two, the severity threshold might be met.

7. An employee who retains her job duties but who is criticized harshly and on a nearly daily basis, never provided guidance on how to improve, transferred to an undesirable office space

(e.g., without ventilation or in a distant location from the remainder of the office staff), and whose requests for assistance are spurned would meet the severity level.

Our standard incorporates not only the substantive "unreasonably inferior" criterion as we have attempted to define and illustrate it, but also the procedural requirement that a plaintiff establish a change in conditions sufficiently severe to meet this high standard by clear and convincing evidence. We do not subject proof of an employer's political motivation to this more rigorous burden requirement because we feel that political animus too often would be difficult to identify by proof beyond a preponderance. Setting a more demanding requirement for the political motive requirement would, we feel, impermissibly chill this kind of First Amendment right of an individual. But proof of changed conditions is not so subject to camouflage, and requiring that it be established beyond a slight tilt in the believed testimony seems to us consistent with the First Amendment interest of the governmental employer. *See Addington* v. *Texas*, 441 U.S. 418, 424 (1979) ("clear and convincing" standard has been used to protect notably important interests in civil cases). *See also Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 925-26 (1st Cir. 1988) (adopting "clear and convincing" standard for proof that wrongfully concealed evidence was inconsequential).

While recognizing the risk of too narrowly describing the task at hand, we suggest that the factfinder's responsibility, in brief, is to determine whether the employee has retained duties, perquisites and a working environment appropriate for his or her rank and title. In some instances, the factfinder will be able to look primarily at the

history of the job at issue to determine whether the employee's new role is unreasonably inferior to what the job is supposed to be. In other cases, however, there may be no stable prior job history to serve as a standard, and the factfinder will be able to examine only the change in the particular employee's working conditions to determine whether the "new" job is unreasonably inferior to the one she previously had. In every case, the burden will be on the employee to establish this fact through clear and convincing evidence.

D.

The case is not over, of course, even when a factfinder determines that the harm suffered by an employee is sufficiently severe to meet our standard. The employee still must persuade the factfinder by a preponderance of the evidence that the diminution in duties was motivated by discrimination on the basis of political affiliation.[9] Under the formula used in political discharge cases, an employer then may seek to establish by a preponderance of the evidence that the changes would have been made *regardless of* political affiliation. *See Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Cordero* v. *DeJesus Mendez*, 867 F.2d 1, 5 (1st Cir. 1989); *Kercado Melendez* v. *Aponte Roque*, 829 F.2d 255, 264 (1st Cir. 1987). Examples of such defenses would be a showing that plaintiff's performance had been so unsatisfactory that assignment to less demanding duties was indicated, a

[9] The question of political motivation could be resolved before the issue of the severity of the harm. For example, in instances in which discovery shows that the defendants' actions obviously were motivated by lawful concerns, it is likely that a district court faced with a defense motion for summary judgment would choose to dispose of the case on that ground rather than to delve into the facts concerning the change in duties.

showing that elimination of an employee's most important projects resulted primarily from unavoidable budget cuts, or a showing that *most* employees within the relevant unit, regardless of political affiliation, experienced a reduction in duties as part of a personnel expansion and reallocation of responsibilities.

One defense available to the government deserves more sustained attention. This is what we shall call the "changeover" defense. It refers to a new administration's claim that challenged actions taken reasonably soon after the "changeover" in power were designed to advance its First Amendment-related interest in implementing its policies. This defense has two aspects. The first recognizes the obvious fact of life that many changes in government can be expected early in a new administration's tenure. In order to best accomplish its policy goals, a new administration may substantially reorganize the structure of one or more departments, it may readjust departmental priorities, or it may initiate entirely new procedures for carrying out its functions. The changeover in government is thus likely to produce substantial alterations in certain employee's jobs not because those employees are members of the outgoing party but because the incoming party, *as a matter of policy*, does not view those jobs to be important. We believe an incoming administration must be given ample room to effect this sort of change without the fear of triggering a multitude of lawsuits by employees whose jobs have changed. Therefore, we believe the factfinder should give some deference to a new government's explanation of how changes made shortly after it assumed power fit into its overall policy objectives. The government would retain the burden of proof on this issue, although its burden would be lightened by the deference given to it.[10]

The second aspect of the "changeover defense" is more sensitive because it required a modification of the traditional *Mt. Healthy* formula. Rather than requiring the government to state non-political reasons for its actions, this prong assumes that the new administration may, at times, feel the need to assign duties deemed especially critical to its political philosophy to employees who share that philosophy. Such employees may be members of the administration's own party. This shift in duties *based on* political affiliation could be proper where the employer can show a reasonable basis for believing that such an employee would likely be more helpful in implementing the new policies than an employee who is a member of an opposing political party. Although in such cases we are assuming that the cumulative duties of the employee who lost responsibility do not fit the *Elrod-Branti* exceptions, and that the employee therefore would be protected from political *discharge*, it may be that he is not protected from losing *certain* job duties that are politically sensitive within the new administration's framework for government. On this prong, as well, the factfinder should give

[10] We add this important caveat: an administration ought not to be deprived of a "reorganization" defense simply because it took place at a relatively late point in its term of office. Some reforms and reorganizations may be much more complex than others and require much more investigation, analysis and preparatory drafting. And some ideas for restructuring may simply have surfaced later in good faith. We see no need to give the government unusual deference when reviewing late-blooming changes. It should be easy enough for a new administration to defend legitimate reorganizations that come late in its term since such changes are more likely to be documented, and less likely to be politically motivated, than changes made when a new administration first comes to power.

some deference to the government's explanation of its needs.[11]

Deference to the government's explanation of its actions does not mean abdicating the responsibility to determine whether the new administration's changes were in fact made to further the effective implementation of its policies. A plaintiff always must be given the opportunity to demonstrate that the government's asserted justification is simply a pretext. In evaluating the changeover defense, the factfinder should take into account, *inter alia*, whether the actions occurred precipitately or after some opportunity for appraisal,[12] whether they seem connected with previously announced goals, and whether they flowed from an organizational or procedural study. In cases implicating the second prong of the "changeover defense", the factfinder must look specifically at the duties in question to determine whether they concern politically sensitive matters.

Thus, drastic changes in job duties and conditions occurring early in the life of an administration may not be made entirely free of potential constitutional liability. Our

[11] A government defense based on policy needs presents another opportunity for ad hoc balancing. We could decide on a case-by-case basis whether the government's need to take an employee action based on political affiliation is outweighed by the burden on the employee. We again choose a formulaic approach: if the government demonstrates that there is some policy justification for internal reshuffling of duties, in view of its mandate as a democratically elected administration, we will refrain from any further balancing. This approach is consistent both with *Elrod* and *Branti* and with our view that governments must have some breathing room to make good on promises to the electorate. The employee, of course, must be given the opportunity to refute the government's assertion that policy concerns motivated the disputed action.

[12] For example, changes made within days of a new administration's ascent to power ordinarily would be more likely to reflect an improper political housecleaning than would changes made months later, after the new officials have had a chance to evaluate how to reorganize their departments to best meet their policy goals.

policy of deference to the government's explanations, however, should allow officials to take *legitimate* actions toward implementing their policies without undue fear of liability. So long as the government is able to provide a substantive reason for its decision that is supported by the facts in the record, the government will be able to justify its actions with the changeover defense.[13]

E.

We do not believe our standard will open the door to a flood of new lawsuits. The severity of the harm necessary to state a cause of action and the defenses available to government defendants should discourage those with petty complaints. Moreover, many cases may be ready for decision at the summary judgment stage since, in our view, conversations and exhibitions of attitude are far less relevant than evidence as to working conditions and responsibilities. Judges should encourage the submission of sufficient documentation to enable such a resolution to be made as early and as often as possible. And to the extent that litigants or their lawyers make conclusory claims

[13] In suggesting some deference to a new administration's explanation of how its program was aided by the changes it made shortly after assuming power, we do not mean to set out a fixed criterion for every case. What we face in the instant case and its companion is a restructuring of important jobs and reassignment of duties to political confidants, the kind of action frequently sought to be justified on policy grounds, particularly right after a new government assumes power. We do not consider here decisions with a more individualized impact — decisions in which the policy justification is more difficult to perceive because the adverse action against a political opponent takes place with no discernible parallel change in favor of a political colleague. Such actions could include a transfer to a distant state, *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980) or a denial of a scheduled promotion or salary increase, *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. 1981); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980). Such decisions arguably present such a divergence from normal administrative practice that assertions of policy justification warrant particular skepticism rather than deference. We express no views on such cases at this time.

without "reasonable inquiry" to assure that claims are "well grounded in fact" and "warranted by... law," Fed. R. Civ. P. 11, the district courts have ample power to forestall abuses. *See id. See generally Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).

Finally, although district court findings of fact will stand unless clearly erroneous,[14] their measurement against the general standards we have set forth will be reviewed by us as a question of law: whether the politically motivated change in an employee's work conditions imposes a substantial burden on the employee's right to free association that is not outweighed by the government's interest in implementing effectively its policies. Our own effort will be directed at striking a balance which will be sensitive to both the rights of civil servants to their political beliefs and associations and to the rights of administrations in power to effectuate their perceived mandates from the electorate. We shall also remain keenly sensitive to the danger that courts be seized upon as arbiters of petty grievances. We recognize the existence of a vast mine field and the possibility that subsequent clearer perception of the hazards may well cause us to refine or change our standards.

III. *Application of Standard*

We conclude that the district court should have the opportunity in the first instance to evaluate the plaintiffs' complaints in light of the standard we announce today. That court may feel able to make judgments based on the evidence it has heard already, or it may choose to hear

[14] We reject defendants' urging that we review the facts de novo as in cases involving free speech. *See Figueroa* v. *Aponte Roque*, 864 F.2d 947, 949 n.3 (1st Cir. 1989).

additional evidence on factors the parties did not previously deem relevant in determining whether an individual has been subjected to unreasonably inferior working conditions. For example, the parties may not have developed evidence concerning the duties and perquisites appropriate for a given position, instead directing their energies toward showing the differences between an employee's old job duties and the new ones. These two inquiries may not lead to the same result.

We therefore remand these cases so that the district court may reconsider its judgments in light of the standard we have developed for identifying a violation of a government employee's constitutional right of free political association. Our disposition makes it unnecessary to consider at this time the other issues raised by the parties.

The judgments of the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

Concurrence follows.

CAMPBELL, *Chief Judge* (Concurring). I join in Judge Coffin's opinion because his analysis seems the most consistent with what the Supreme Court has said to date. The Court will soon, however, be studying for the first time the very sort of matter now before us, *see Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989); and I hope that, upon further analysis, the Court will decide *against* allowing state employees to sue for job changes that fall short of actual or constructive discharges.

Judge Breyer has brilliantly highlighted the dangers of our present position. Whatever good may occasionally result from allowing recovery for deprivation of job responsibilities and perks, is outweighed by the pressures the existence of such an action will impose upon the government. The threat of such lawsuits could deter administrators from making needed reorganizations and personnel shifts.

Judge Coffin does as well as can be done in setting out criteria to separate meritorious from spurious claims. But the intricacy of the necessary analysis makes it difficult to predict outcomes. Many situations will involve uncertainty until resolved in court. The only sure way for an administrator to avoid liability will be to avoid changing the status quo. Thus the voters' mandate for change may go unheeded. In my view, the Constitution should never be read as providing for this kind of relief.

Torres-Hernandez exemplifies a scenario to be expected in many of these cases. I completely share Judge Breyer's disbelief that recovery is a serious possibility here. Nonetheless, for the time being, I join my colleagues in vacating and remanding, thus leaving that case alive for the moment at least. I do so solely in the interests

of uniformity and because I hesitate to cut plaintiff off until the Supreme Court has had time to establish the ultimate standard.

Concurrence and Dissent follows.

BREYER, *Circuit Judge*, (concurring and dissenting).

I.

Concurrence

The majority holds that the First Amendment, as interpreted by the Supreme Court in *Elrod* and *Branti*, protects a government employee (in a "nonpolitical" position) from demotion to an "unreasonably inferior" work status because of membership in a particular political party. I concur in this holding. The *Elrod/Branti* text that the majority quotes, see pp. 9-11, *supra*, indicates that the opinions' rationale is not limited to discharges; and, it is difficult to see how the First Amendment can prohibit politically motivated discharge, yet not prohibit politically motivated demotions or other personnel actions that are often just as serious. Thus I cannot say the majority's reading of *Elrod* and *Branti* is wrong.

Moreover, the majority's opinion fully recognizes that "political retaliation" cases, such as those before us, embody not one, but two sets of potentially conflicting interests. On the one hand, the First Amendment protects a goverment employee's association with others in a political party. On the other hand, a major reason the Constitution protects associational interests is so that individuals can join together in working to elect a government that will create practical programs of administration to carry

out the policies they advocate. Thus when courts apply the First Amendment to protect political associational interests of government employees, they must recognize *not only* that the lack of *any* protection can open the door to unwarranted, politically based victimization, but also that too much judicial intervention may unjustifiably interfere with the electorate's ability to see its political aims translated into action.

The majority has made a fine effort to reconcile these competing interests. On the one hand, it permits suits designed to show a serious, politically motivated "demotion." On the other, it seeks to prevent juries from simply supplanting civil service commissions — by insisting that the relevant harm be severe, that it be shown by clear and convincing evidence, and that it correspond roughly to the types of significant harm that the court illustrates with examples. To maintain adequate flexibility for an administration, particularly a new administration, to implement new policies, the court constructs the "changeover" defenses, and creates rules of "deference" for the factfinder, whether judge or jury. In short, the judicial machinery is carefully calibrated to meet competing constitutional needs.

Yet, I must confess to doubts. For one thing, will these standards prove sufficient to protect the administrative (and, ultimately, the electorally-based, democratic) need for flexibility? Suppose, as in 1971, a new Federal Trade Commission chairman wished to reinvigorate a moribund agency. Suppose the new chief wished to change the responsibilities of top-level civil servants, bringing those more likely sympathetic to new policies closer to the center of power. Further, suppose that a higher percentage of those persons whom he wished to entrust with increased responsibility, persons whom he

believed more sympathetic to his policies, belonged to the newly elected political party. Will not many of those replaced find that their job responsibilities have "been substantially narrowed," leaving them without "supervisory authority over matters of comparable significance," p. 19, *supra*, or that their (nonpolitical) jobs, which previously embodied "exciting and responsible work," now involve "only a few routine and technical assignments?" *Id*. Will it be possible to *prove in court* that the new, replacement group of "top lieutenants" is more capable that the old? Might not the new chief have based changes in responsibility in part upon what he has heard informally, or even sensed, including matters which (because they are impressionistic or even derogatory) other administrators cannot or will not testify about in a court? *Compare* American Bar Association, *Report of the Commission to Study the Federal Trade Commission* (1969) (detailing need for revitalization at FTC) *with* President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* ("The Ash Report") (1971) (advocating restructuring of responsibilities to centralize authority in independent agencies).

Of course, the majority has dealt with this problem by allowing the government to defend against a charge of politically motivated acts by demonstrating that the changes were part of a policy initiative, and the majority insists that judge or jury "defer" to that determination. Yet, a plaintiff (a Republican when Democrats are in power, or vice versa) will still win unless "an employer can *show* a reasonable basis for believing that...[the employee to whom plaintiff's responsiblities were shifted] is more likely to help implement the new policies than an employee who is a member of an opposing political party." P. 24, *supra* (emphasis added). Can a department

chief *know* what he will, or will not, be able to *show* (to "establish by a preponderance of the evidence") at some future time *in court*, before a jury, rather than before a more expert civil service board? Without such knowledge, can he act boldly enough to translate the will of an electing majority into workable policy? Will politically appointed department heads, without such knowledge, and fearing damage judgments after court battles, tend to follow the path of least resistance, namely, the status quo? Will the inevitable, serious, and unknown risk of liability contribute to bureaucratic inertia? At a minimum, a new official trying to implement new policies will have to document his reasons for each change of administrative responsibilities and employee transfer, thereby transforming fairly routine administrative changes into changes that the Constitution permits only for "cause," with an accompanying need for legal documentation of that "cause."

For another thing, despite the majority's standards, it may prove difficult to prevent the courts from being swamped with a vast number of plaintiffs complaining of the sorts of personnel actions that a civil service board can more properly and more fairly decide. (For examples of administrative grievance procedures already in place, see 5 U.S.C. § 1206 (authorizing and directing the Special Counsel of the federal Merit Systems Protection Board ("MSPB") to investigate prohibited personnel practices on request); 5 U.S.C. §§ 7512, 7513 (b) - (d), 7701(a), 7702, 7703(a) (1982), § 7543 (1982 & Supp. II 1984) (providing, for all significant adverse actions taken against civil servants, agency notice, hearing or opportunity to answer, appeal to the MSPB, review by the Equal Employment Opportunity Commission in cases involving alleged discrimination, and judicial review of MSPB de-

cisions); P.R. Laws Ann. tit. 3, §§ 1301-1431 (1978 & Supp. 1986) (detailing protections against improper employment practices under the Puerto Rico Public Service Personnel Act).) We know that when the governorship of Puerto Rico changed hands in 1984, about 300 plaintiffs who lost their jobs brought suit, out of about 600 in "trust" or "confidence" positions who were dismissed, in turn out of about 3,700 civil servants who were employed in "trust" or "confidence" positions in a civil service of about 160,000. *See Juarbe Angueira* v. *Arias*, 831 F.2d 11, 14 (1st Cir. 1987). Our decision today opens the door of the federal courts to all those in the civil service, including those towards the bottom of this vast pyramid, who might claim that a significantly adverse personnel action rested on political motives. My experience with those of the 300 "dismissal" cases that have reached this court leaves me uncertain of the abilities of the federal courts, insulated from the political process, to determine which specific jobs in fact are politically sensitive (let alone which "job duties" are "politically sensitive," *see* p. 24, *supra*) and, it has made me aware of the concomitant risk of constitutionally freezing into permanent place the civil service structure of the moment.

Despite these doubts, I join the majority opinion because *Elrod* and *Branti*, in my view, mandate the majority's result. At the same time, these doubts prevent me from joining in the disposition of *Torres Hernandez* v. *Padilla*.

II.
Dissent: Torres Hernandez

A reading of the record in *Torres Hernandez, disbelieving all defense witnesses and believing all that plaintiff says*, leads me to conclude that the most that plaintiff could show is the following:

a. In 1981, the Mayor (PDP) faced a Municipal Assembly dominated by the other party (NPP). He know that the plaintiff was an NPP activist. He was having great difficulty dealing with the Assembly.

b. In March 1981, the Mayor found out that the plaintiff, his chief personnel officer, was having lunch at the City Hall with Municipal Assembly officials, including the Secretary of the Assembly. He told her not to do so.

c. In April 1981, the Mayor met with plaintiff and (in her words) "indicated to [her] that he was tired, that he was fed up with both the PDP and the NPP." Plaintiff added:

In that conversation, or at that meeting that the Mayor and I had in private, and with Your Honor's permission I'm going to use an improper word, he said to me, "Maria Teresa, I'm going to tell you something David [an NPP member] told me: a leader of the Popular Democratic Party, that is himself, is a fool, a sucker, because he thinks Maria Teresa is Popular and Maria Teresa is one of ours."

d. In July 1981 (and again in March 1982), the Mayor was having a hard time getting his budget passed. He again asked plaintiff not to make

regular visits to his political opponents at the Municipal Assembly. He seemed angry.

e. At some point, two "irregular" (positions outside of the permanent civil service classification system) employees in plaintiff's division were dismissed; another (who, according to plaintiff, did not like to work Mondays or Fridays) was transferred. All were members of the NPP. Two others were retained; one of these was PDP, one was NPP. Three others were hired; the record does not show their party affiliation.

f. In February 1983 (*one and one-half years later*), the Mayor hired a special assistant who bossed plaintiff around, gave her a smaller desk, and told her to work on file updating.

g. In May 1983, the Mayor wouldn't let plaintiff go on a planned vacation. He gave as an excuse that she was needed because her assistant was sick. The assistant did not seem very sick. Plaintiff has a nervous breakdown and left work.

h. In January 1984, after recovering from the breakdown, plaintiff returned to work and asked for a relocation (on advice from her doctors). The Mayor sent her to the Health Department where she was given (arguably) menial work, but continued to be paid the same salary she had as a personnel officer. She must have been satisfied, for she has complained, not about this job, but about being transferred back to her old job.

i. She ran into the Mayor one day. He seemed cold and distant. This scared her.

j. In March 1984, the Mayor ordered her back to her old job. He berated her, apparently because her plan to get him a larger payroll check

by lowering his payroll retirement deduction backfired, leaving him with a demand for money from the retirement commission. (Could this be why he was a little cold and distant?) Plaintiff had another breakdown.

I would include, as an illustration of circumstances in which a plaintiff can *not* prevail, the very facts of this case. I would hold that plaintiff has not made out a case of unlawful politically motivated demotion. She fails because the bulk of the evidence she relies upon to prove "political motivation," namely, her lunchtime meetings with NPP officials, are, at best, ambiguous in respect to whether (given the circumstance of her working relationship with the mayor) they constitute activity that the Constitution protects.

To permit a finding of liability and assessment of damages on the basis of these facts would suggest, for example, that a mayor of Chicago could not forbid his personnel officer to hold lunchtime meetings with opposition city council members. It would suggest that the head of the federal Office of Management and Budget, during a time of budget crisis, could not try to control meetings between his top civil servants and the Speaker of the House of Representatives (or his staff). Such a finding would place serious, if not insurmountable, obstacles before a mayor who wishes to run his own personnel office and to overrule a civil servant whom he sees as an obstacle, or who hires a non-civil service staff assistant to help him to supervise the running of the office. It would mean that a mayor must either give full personnel responsibilities to a person he sees as a political activist meeting regularly with his political enemies or build a documented case that will show by a "preponderance of the evidence" in court that there is "cause" for transfer. Indeed, since

the only other evidence of political favoritism in this case consists of the fact that the Mayor *also* dismissed three other employees who were members of the NPP, two of whom held "irregular" positions, the decision also requires the Mayor to document reasons for these decisions (even if those dismissed see no problem), thereby transforming low-ranking irregular jobs into a form of tenured employment. If liability were assessed in this case, the only safe course of action for a newly elected mayor would be to change as few responsibilities as possible, to work with the inherited administrative structures, to accept the most serious limitations on his ability to bring about change. That is why I think the conduct at issue in this particular case is properly governed by civil service rules, not the Constitution of the United States.

For these reasons, while I join the opinion of the majority, I would not remand the case of *Torres Hernandez* v. *Padilla* for reconsideration.

Dissent follows.

TORRUELLA, *Circuit Judge* (Dissenting). Someone once said that a camel is a horse that was designed by a committee, an observation of particular relevance to *en banc* opinions. *See United States* v. *M/V BIG SAM*, 693 F.2d 451, 456 (5th Cir. 1982) (Gee, J. dissenting). The present case is no exception. For the sake of reaching a consensus, the majority compromises principle and further clouds the law in this fundamental area of First Amendment rights. That is too high a price to pay for collegiality.

The majority concludes that some politically discriminatory personnel actions against public employees short of dismissal may constitute a violation of the employee's associational rights under the First Amend-

ment, and thus actionable pursuant to 42 U.S.C. § 1983. This result is hardly remarkable, although the restrictions placed upon this holding by the majority are. This conclusion, minus these severe restrictions, was the same one reached by the panels in both of these appeals back in 1987,[1] as well as that of other circuits since.[2] *E.g.*, *Pieczynski* v. *Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989), *reh'g denied*, 1989 U.S. App. Lexis 10065; *Lieberman* v. *Reisman*, 857 F.2d 896, 900 (2d Cir. 1988); *Bennis* v. *Gable*, 823 F.2d 723, 731 (3d Cir. 1987). *See also* Note, *First Amendment Limitation on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181 (1982); Note, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374 (1987). *Contra*, *Rutan* v. *Republican Party of Illinois*, *supra*; *Delong* v. *United States*, 621 F.2d 618, 623-24 (4th Cir. 1980).

What is remarkable is the myopic reluctance of this Court to fully recognize the associational rights of public employees in non-discharge personnel situations, given the overwhelming evidence that this result is mandated by

[1] *See Torres Hernández* v. *Padilla*, Nos. 86-1643, 86-1644 (1st Cir. June 22, 1987); *Agosto de Feliciano* v. *Aponte Roque*, No. 86-1300 (1st Cir. Aug. 14, 1987).

[2] It should also be noted that many courts have applied this principle to the issue of patronage hiring as well. *See Mazus* v. *Dep't of Trans.*, 629 F.2d 870, 873 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Rosenthal* v. *Rizzo*, 555 F.2d 390, 392 (3d Cir. 1977), *cert. denied*, 434 U.S. 892 (1977); *Indiana State Employees Ass'n* v. *Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194, 1196 (S.D. Ind. 1986); *Torres* v. *Grunkmeyer*, 601 F. Supp. 1043, 1047 (D. Wyo. 1984); *Shakman* v. *Democratic Org.*, 481 F. Supp. 1315, 1327 and n.8 1328 (N.D. Ill. 1979); *McKenna* v. *Fargo*, 451 F. Supp. 1355, 1357 (D. N.J. 1978), *aff'd*, 601 F.2d 575 (1979). *See also Comment, Patronage and the First Amendment After Elrod v. Burns*, 78 Colum. L. Rev. 468, 475-76 (1978); *Comment, Political Patronage In Public Contracting*, 51 U. Chi. L. Rev. 518, 527-28 n. 58 (1984). *Contra Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 949-51 (7th Cir. 1989) (en banc), *cert. granted*, 58 U.S.L.W. 3185 (U.S. Oct. 3, 1989).

Branti v. *Finkel*, 445 U.S. 507 (1980), and *Elrod* v. *Burns*, 427 U.S. 347 (1976). This reluctance is evidenced not only by the unusual amount of foot dragging that has preceded reaching a consensus on an issue of minimal complexity, but more pointedly, by the timbre of the majority's opinion. That opinion, which in places more resembles a defense litigation manual than an Article III court decision, throws to the wind all notions of case and controversy resolution. *See ante* at 18-20. Reluctance is also manifested by the unprecedented number and nature of tailor-made stumbling blocks, incantated from thin air and placed in the path of civil rights litigants like a carefully laid legal mine field.

As if those chilling processes were not enough, in the questionable interest of keeping this Court's docket within acceptable levels, *ante* at 26, the majority concludes its arctic discourse by unwarrantedly invoking rules of sanction and review which will undoubtedly intimidate both the bar and the bench. *See ante* at 26-27. All of this is secondary, however, to the fact that the standards created are confusing, unworkable and constitutionally flawed.

As linchpin for its rationale, the majority starts by telling us that "the difficulties facing courts in cases involving [public] employer action less final and definitive than dismissal are potentially enormous." *Ante* at 8. This is, of course, totally irrelevant, but even if it were material, it is not any more difficult, tedious or complex to resolve these political harassment cases than the myriad of other issues routinely decided by courts, particularly in the area of employment practices. Deciding such issues is the daily bread and butter of district and appellate courts. *See Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). Each day federal courts "sift out the chaff of minor irritants and frustration from the wheat of truly significant

adverse actions," *ante* at 8, in cases involving private employers accused of engaging in discriminatory or harassing actions short of discharge, in scenarios in which the alleged animus is race,[3] age,[4] gender,[5] or grounded on anti-union motivation.[6] Despite the application of these laws to private employers and "the difficulties facing courts" in deciding what is discriminatory or harassing in those situations, private enterprise generally survives, and still manages to pass, with some moderate degree of success, the ultimate litmus test of efficiency: turning a profit. Why should not the *public* employer be held to similar standards as the private employer, particularly when dealing with the protection of core First Amendment rights? The protestation of the majority, that only restrictive application of § 1983 will allow the governmental employer to operate efficiently, is contrary to the above cited experience in private industry, and for that matter, in the public sector as well wherein numerous restrictions on

[3] 42 U.S.C. § 2000e *et seq.*; *Falcón* v. *General Tel. Co. of Southwest*, 626 F.2d 369 (5th Cir.), *reh'g denied*, 631 F.2d 732 (1980).

[4] 29 U.S.C. § 626(e)(1); *E.E.O.C.* v. *Air Line Pilots Ass'n Int'l*, 661 F.2d 90 (8th Cir. 1981).

[5] 42 U.S.C. § 2000e *et seq.*; *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775; *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980).

[6] 29 U.S.C. § 158(a)(1); *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982).

discrimination and harassment short of discharge are applicable to public employers.[7]

The argument that such restrictions on governmental action somehow nullify the democratic majority vote is equally spurious. The First Amendment, like most of the Bill of Rights, exists to protect minorities from abuses of the majority even when constituted in a democratically elected government. Winning an election is not a license to commit First Amendment abuses. *See Branti* v. *Finkel*, 445 U.S. 507; *Elrod* v. *Burns*, 427 U.S. 347.

As is the case with other standards promoted by this court in the field of political discrimination,[8] the so-called "categorical approach" promoted by the majority establishes a non-standard which is biased in favor of the public employer. The emphasis is in the wrong place. This court appears to be more concerned with "harassing lawsuits," *ante* at 16, than with harassed employees. Furthermore, in establishing a "clear and convincing evidence" standard for plaintiffs to prove "unreasonably inferior" changes in conditions sufficient to find a violation of § 1983, the court engages in action tantamount to judicially amending this legislation. I am unaware of, nor does the majority cite, any case litigated pursuant to § 1983 in which a standard of proof higher than that required in all civil suits (*i.e.*, proof beyond a preponderance of the evidence) has been exacted. *Cf. Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775.

[7] *See, e.g., Limongelli* v. *Postmaster General of the United States*, 707 F.2d 368 (9th Cir. 1983) (age discrimination); *Cartagena* v. *Secretary of the Navy*, 618 F.2d 130 (1st Cir. 1980) (race discrimination); *Sweeney* v. *Bd. of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979) (gender discrimination), *cert. denied*, 444 U.S. 1045 (1980).

[8] *See, e.g., Figueroa Rodríguez* v. *Aquino*, 863 F.2d 1037, 1048-49 (1st Cir. 1988) (Torruella, J., dissenting).

Neither case relied on by the majority, *Addington* v. *Texas*, 441 U.S. 418 (1979), nor *Anderson* v. *Cryovac*, Inc., 862 F.2d 910 (1st Cir. 1988), involved civil rights litigation. Their holdings are completely irrelevant to the present controversy. *Addington* concerns the standard of proof for civil commitment which, because the end result is akin to criminal imprisonment, requires a higher standard of proof than in an ordinary civil case. *Anderson* is equally inapposite. It involves the presumption raised against a party who destroys, the contents of documents which affect that party. Moreover, in *Price Waterhouse* v. *Hopkins*, a Title VII case, the Court said as follows:

> Conventional rules of civil litigation generally apply in Title VII cases, *see, e.g., United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (discrimination not to be "treat[ed]... differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. *See, e.g., Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 691, 74 L.Ed.2d 548 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual. *See Santosky* v. *Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L.Ed.2d 599 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 1810, 60 L.Ed.2d 323 (1979) (involuntary commitment); *Woodby* v. *INS*, 385 U.S. 276, 87 S. Ct. 483, 17 L.Ed.2d 362 (1966) (deportation); *Schneiderman* v. *United States*, 320 U.S. 118, 122, 125, 63 S. Ct. 1333, 1335, 1336, 87 L.Ed.2d 1796 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, *see, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 3008, 41 L.Ed.2d 789 (1974) (defamation)....
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> Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy*, 429 U.S., at 287, 97 S. Ct., at 576; *Transportation Management*, 462 U.S., at 400, 403, 103 S. Ct., at 2473, 2475. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Price Waterhouse v. *Hopkins*, 109 S. Ct. 1792-93. In a century of civil rights litigation no court has ever proposed the barriers that the majority is today establishing.

But the majority is still not satisfied. Instead, it goes further and adds a new weapon to the public employer's arsenal, the so-called "changeover" defense. This defense "refers to a new administration's claim that challenged actions taken reasonably soon after the 'changeover' in power were designed to advance its First Amendment-related interest in implementing its policies." *Ante* at 23. The majority justifies this new defense on the grounds that "an incoming administration must be given ample room to effect this sort of change without the fear of triggering a multitude of lawsuits by employees whose jobs have changed." *Id*. Lest the government employer be too encumbered by the minor requirement that it carry the burden of proof on this issue, the majority obligingly lightens this burden "by the deference given to" the new administration's claim. *Id*. As expected when judicial alchemy is at work, the majority cites no authority for this new creation.

Lest we lose interest in this mode of creative thinking our attention is called to an "important caveat." *Ante* at 23 n. 10. "Reasonably soon" after the changeover does not necessarily mean what it says, as "an administration ought not to be deprived of a 'reorganization' defense simply because it took place at a relatively late point in its term of office." *Id*. But, we are told, "changes made within days of a new administration's ascent to power ordinarily would be more likely to reflect an improper political housecleaning." *Ante* at 25 n. 12. So, we can say with some "confidence," that the "changeover" defense is available for changes that take place reasonably soon after the changeover in administration, which may mean anytime during the life of the administration, provided it

is not too close to the changeover. It is hard to imagine how government has survived up to now without the benefit of such non-guidelines.

But the "changeover" defense has more to offer. It has a second prong. *Ante* at 24. When faced with this defense, the public employee is caught in the prongs of a dilemma. The second prong skewers *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). No longer will the government be required to state non-political reasons as the primary motivating factor in dual motive actions against employees, if the action is short of discharge. Employers will be allowed to assume that their politically copesetic subordinates will be more helpful in implementing new policies, *i.e.*, career governmental employees are not to be trusted to comply with their oath of office. As of this were not enough the factfinder must again give "deference" to the government's explanation of its needs in this respect. *Ante* in 24. Again the majority gives no authority for these new standards but requires us to accept them on faith. There is a limit to everything, even faith, and to my view, such unsupported arguments cannot be acceptable when dealing with a subject matter as fundamental as the associational rights of public employees.

The decision reached by this Court today is most unfortunate. It emasculates and downgrades core rights protected by the First Amendment, effectively insulating that most insidious, and difficult to prove, governmental personnel practice: political harassment. It is an unwarranted boon to unscrupulous politicians who will most assuredly take, and use, all the advice which has so generously been given. The best that I can say about this decision is that it runs contrary to the remedial nature of the Civil Rights legislation in question. I dissent.